29005

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1900.

BOSWELL M. BLYTHE,
Plaintiff in Error,

Against

FLORENCE BLYTHE HINCKLEY,
Defendant in Error.

MOTION TO DISMISS AND TO AFFIRM.

Comes now the Defendant in Error, by her attorney and counsel, appearing in that behalf, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction, and because the judgment or decree which is sought to be reviewed by said writ is a judgment and decree duly made, given and entered by the Supreme Court of one of the United States, to-wit: The Supreme Court of the State of California, and it fully appears from the record herein:

FIRST.—That no Federal question was involved in the proceedings in which said decree of distribution complained of was made, nor in the said alleged judgment of the Supreme Court of the State of California affirming said decree of distribution, nor in any judgment or proceeding sought to be reviewed under the said writ.

SECOND.—It fully appears from the record herein, that the right of the defendant in error to succeed to the estate of Thomas H. Blythe, deceased, was involved and determined in the case entitled "In the Matter of the Estate of Thomas H. Blythe, deceased,—Florence Blythe vs. Abbie Ayres, et al.," and disposed of and decided by the Superior Court of

the City and County of San Francisco, State of California, on the 22d day of October, 1890, and affirmed in favor of the defendant in error by the Supreme Court of the State of California on the 30th day of November, A. D. 1892, as fully appears by the decision of said Supreme Court of the State of California, made in said proceeding entitled as aforesaid, and reported in the 96th Cal. Reports, at page 532 et seq., which decision, and the matters therein expressed, are referred to in and made a part of the plaintiff's complaint in this action and proceeding, and that it fully appears that no writ of error or appeal has issued to review said decision, or the judgment and decree entered therein, by the Supreme Court of the State of California, in favor of the defendant in error, within two years after the said 30th day of November, A. D. 1892, or at any other time or at all.

THIRD.—It does not appear from the record in this cause that the decision or judgment and decree of the State Court complained of was or is repugnant to the Constitution, or to any treaty, or to any law, of the United States.

FOURTH.—It does not appear from the record in this case that said plaintiff in error, or his ancestor, or either of them, claimed or claims any right, or title, or privilege, or immunity under the Constitution of the United States, or under any treaty or law of the United States.

FIFTH.—Because the record in said cause fails to show that there is or was any conflict between any law of the State of California, and the Constitution, or any law or treaty, of the United States, in reference to the subject-matter of litigation, or the right of the parties thereto.

SIXTH.—It fully appears from the record herein that Thomas H. Blythe, at and before the time of his death, was a resident and citizen of the State of California, and that by reason thereof the right of the defendant in error to succeed to his estate was and is wholly governed by the laws of said

State then in force, and that no Federal question was or is involved in the proceeding in relation thereto, and that the right of said defendant in error to succeed to his property depended upon the construction of a State statute, and that the decision of the Supreme Court of the State of California upon that question is conclusive upon this Court.

SEVENTH.—That the question of alleged kinship of said plaintiff in error, and his father, James T. Blythe, and each of them, to Thomas H. Blythe, deceased, and of their, and of either of their, alleged right to his estate, and of the kinship of the defendant in error, Florence Blythe Hinckley, to said Thomas H. Blythe, deceased, and her right to his estate, were involved and determined in the proceedings in the cause entitled "In the Matter of the Estate of Thomas H. Blythe, deceased,—Florence Blythe vs. Abbie Ayres, et al.," and disposed of and decided by the Superior Court of the City and County of San Francisco, State of California, on the 22d day of October, 1890, and affirmed against the father and ancestor of the plaintiff in error, as well as against the plaintiff in error, by the Supreme Court of the State of California, on the 24th day of April, 1894, and that no writ of error was applied for or issued to review said decision or judgment and decision rendered therein, within two years after the said 24th day of April, A. D. 1894, or at any time or at all.

EIGHTH.—That it fully appears from the record in this case that in all proceedings complained of there was a question of fact involved as to whether the defendant in error was or was not the child, related to, and the sole heir at law of the said Thomas H. Blythe, deceased, and that the State Court found these facts in favor of the defendant in error, and that, therefore, this Court has no jurisdiction or authority under the writ issued in this case to modify or set aside, or review the facts so found by the State Court.

NINTH.—In that it appears from the record in this case that the State Court found as facts that the said Thomas H. Blythe, in his life time, had adopted the said Florence as his daughter under and by virtue of the provisions of Section 230 of the Civil Code of the State of California, and had instituted her as his heir under and by virtue of the provisions of Section 1387 of said Code, and the defendant in error shows and claims that this Court has no jurisdiction or authority to review the action of the State Court in relation to these facts.

TENTH.—That it fully appears from the record herein that the defendant in error petitioned the Superior Court in the matter of said estate under Section 1663 of the Code of Civil Procedure of the State of California to have her share of the estate of Thomas H. Blythe, deceased, to-wit: The whole thereof, distributed to her, and that in due time James T. Blythe, the father of the plaintiff in error, appeared in said proceedings and did then and there resist the application of said Florence to have distributed to her any part or share of said estate, and that in said proceeding it was adjudged by the Superior Court that the defendant in error was entitled to have the estate of Blythe distributed to her, and the said Court did make and cause to be entered its decree, distributing the real estate described therein, which is the same as described in plaintiff's complaint herein, and caused the possession thereof to be transferred to her; that an appeal from said decree of distribution of the 29th day of October, 1894, was taken by said James T. Blythe, and others, to the Supreme Court of the State of California, and that on November 30th, 1895, the said Supreme Court of the State of California made a decision affirming said decree of distribution of the said Superior Court in favor of the defendant in error, and that thereafter, on the 24th day of March, A. D. 1897, the said Boswell M. Blythe, plaintiff in error herein, with others, caused to be issued out of the Supreme Court of the United States, a writ of error, directed to the Honorable Judges of the Su-

preme Court of the State of California, commanding them that they, under the seal of said Supreme Court of the State of California, distinctly and plainly to send the record and proceedings in said matters, to the said Supreme Court of the United States, together with the writ so issued as aforesaid, within sixty days from date thereof, and that said writ of error was duly served as by law required, and thereupon the said Supreme Court of the State of California did cause to be certified to the Honorable Supreme Court of the United States, the record in reference to said decree of distribution complained of, and which record was filed in this Court and was entitled "In the Supreme Court of the United States, October Term, 1896. Henry T. Blythe, et al., plaintiffs in error, vs. Florence Blythe Hinckley," and that thereafter such proceedings were had in said cause by this Honorable Court that said writ of error was on the 24th day of May, 1897, dismissed for want of jurisdiction, as will fully appear from the record of said case in this Court, to which reference is hereby made, and which will more fully appear from the decision of this Honorable Court, reported in the 167 United States Reports, at page 746, and that by reason thereof, the defendant in error contends that said matter is final and conclusive as against the plaintiff in error in this cause, and that said decision of the said United States Supreme Court was *res adjudicata*, and that by reason thereof the said decree of distribution of the State Court awarding said property to the defendant in error, became final and conclusive, and that the plaintiff in error herein cannot relitigate the questions then involved, and that by reason thereof this Court has no jurisdiction to entertain the writ of error in this case, and to review the decision of the Supreme Court of California, complained of herein.

And the said defendant in error by her attorney and counsel, as aforesaid, also moves the Court to affirm the judgment and decree, to review which said writ of error was herein ordered,

although the record in said case may show that this Court has jurisdiction of the premises for the following reasons:

1st. Because of each and all of the reasons and grounds above specified.

2d. That it is manifest from the record herein that the reasons assigned for the taking of the writ of error were and are frivolous, and that it was taken for delay only.

WILLIAM H. H. HART,
Attorney for the Defendant in Error, for the purpose of these motions.

In the Supreme Court of the United States,

October Term, 1900.

BOSWELL M. BLYTHE,
Plaintiff in Error,

Against

FLORENCE BLYTHE HINCKLEY,
Defendant in Error.

NOTICE OF SUBMISSION OF MOTIONS TO DISMISS AND AFFIRM.

To Messrs. S. W. Holladay and E. Burke Holladay, Attorneys for Plaintiff in Error; and to L. D. McKisick, Esq., and Jefferson Chandler, Esq., of Counsel:

Please take notice that on Monday, the 14th day of January, A. D. 1901, at the opening of the Court, or

as soon thereafter as counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States at the court-room of said Court, in the Capitol Building, in Washington, D. C., for the decision of said Court thereon. Annexed hereto is a copy of the brief or argument to be submitted with said motions in support thereof.

WILLIAM H. H. HART,

Attorney for the Defendant in Error, for the purpose of these motions.

STATEMENT OF THE CASE.

This is a motion to dismiss or affirm an appeal taken by the plaintiff Boswell M. Blythe from the final judgment and decree of the Supreme Court of the State of California, affirming the decision rendered in favor of defendant in the Superior Court of the City and County of San Francisco, State of California.

THE COMPLAINT.

It is alleged in substance therein that Thomas H. Blythe was, at the time of his death, a naturalized citizen of the United States, residing and having his home in the City and County of San Francisco, State of California; that he died intestate on or about the 4th day of April, 1883, leaving considerable personal property, and was, at the time of his death, the owner in fee, and seized and possessed of the real property mentioned in the complaint and to which property plaintiff sought to quiet his title (State Record, fol. 7). That James T. Blythe who was a native born citizen of the United States when the said Thomas H. Blythe died and who was the father of plaintiff, was one of the next of kin, living at the time of

the death of said Thomas H. Blythe, and was one of his heirs at law. That said James T. Blythe in his life-time was by inheritance one of the heirs at law of said Thomas H. Blythe, the owner in fee and seized of an undivided interest as tenant in common of all real estate of which the said Thomas H. Blythe died seized (State Record, fols. 4-6); that the said James T. Blythe departed this life since the death of said Thomas H. Blythe; that plaintiff succeeded and is now the owner in fee and seized of said undivided interest in said estate (State Record, fol. 6); that defendant Florence Blythe Hinckley claims to be the owner in fee, and seized of said above described real property (State Record, fol. 13); that the claim of said Florence to said real estate grows out of and is based solely upon the following facts and circumstances, and none other, viz. (State Record, fol. 13); that the said Florence was born in England in the year 1873, and is the illegitimate child of a woman then named Julia Perry, who was, and whose child said Florence was at her birth, native born subjects of Victoria Queen of Great Britain and Ireland (State Record, fol. 14); that the said Florence remained in England until after the death of Thomas H. Blythe; that said Florence

> "had no inheritable blood in her viens when she was born, nor when the said Thomas H. Blythe died, and she was therefore, incapable, by the law of nations, the common law of England and of the State of California, the Constitution of the United States, particularly Section 10 of Article I thereof, and the 14th Amendment thereto, and Section 1978 of the Revised Statutes, of inheriting said above described real property, or any part thereof, or interest thereto or therein, to the exclusion of plaintiff's said father, or at all" (St. Rec., fol. 17).

That after the death of Thomas H. Blythe in 1883 the said Florence who had, prior thereto, never been out of England, came to the United States, and direct to the City and County

of San Francisco. She was, at that time, an infant alien, and ineligible to become a naturalized citizen of the United States (St. Rec., fol. 18).

> "There was not at the time of the birth of said Florence, nor at any time thereafter, any treaty in force between the United States and Great Britain under or by the terms and provisions of which the said Florence, or her mother could inherit real property situated in the State of California, or in any other State in the Union. That said Florence, after she came to the United States and to the State of California, set up a false claim to said real estate claiming that she had been adopted under the provisions of Section 230 of the Civil Code of California, and that said Blythe had instituted her as his heir under the provisions of Section 1387 of said Code" (St. Rec., fol. 21).

It is further averred that there was no law in England under which said Thomas H. Blythe could have legitimated the defendant in error, or made her his heir, or changed her allegiance or residence without bringing her to California (St. Rec., fol. 22).

The bill then proceeded to anticipate and attack the muniments of the title of the defendant in error, viz: two decrees of the Superior Court of San Francisco sitting in probate, and to cast epithets at them. As those decrees are important, we proceed to give the averments concerning them separately.

(1) The first was a decree made upon a direct proceeding in said Superior Court to determine the question of the heirship, brought under Section 1664 of the Code of Civil Procedure of California. In that regard the complaint averred (St. Rec., fol. 24-27):

> "that after said Florence came to America in the year 1883, the said James Crisp Perry, who brought said Florence to America, and who was then and there an alien and subject of the Queen of Great Britain and Ireland, was, without authority of law, appointed by the Superior

Court of the City and County of San Francisco, guardian of the person and estate of said Florence, and thereafter, namely, after the 18th day of March, 1885, as such guardian the said James Crisp Perry, without authority of law, commenced a special proceeding in said Superior Court in the name of said Florence under the provisions of an Act of the Legislature of the State of California, which is now Section 1664 of the Code of Civil Procedure of the State of California, and applicable only to citizens of the United States, which said special proceeding was for the purpose of having the said Court ascertain, adjudge and determine the claim of said Florence to the heirship of said Thomas H. Blythe, and her claim to the ownership of his estate, and in substance that she, said Florence, was the daughter and sole heir of said Thomas H. Blythe under and by virtue of Sections 230 and 1387 of the Civil Code of California, or under or by virtue of one or the other of said sections; and by virtue thereof to have the said Court adjudge and decree that said Florence was the sole heir at law of the said Thomas H. Blythe, and entitled to inherit his real estate as well as to succeed to his personal estate" (St. Rec., fol. 27).

[Mem. It will thus be seen that the matter of the right of defendant in error to the property which the plaintiff seeks to litigate here was distinctly pleaded by her application to the Superior Court.]

The complaint then proceeds to show that the question of the alleged disability of said Florence by reason of the circumstances of her birth and her alienage were actually litigated in said proceedings. In this regard it is averred:

"thereafter such proceedings were had in said Court in said special proceeding that it was for the first time made therein to appear plainly to the Court, by evidence only as the fact was and is, that said Florence was and is an illegitimate child, that she was born out of wedlock in England, that the said Thomas H. Blythe never saw her in his lifetime, that neither she, nor her alleged mother, nor the father, nor the mother of the alleged mother of

Florence had ever been within the United States until after the death of said Blythe; that they were, in fact, all aliens, and ineligible to become citizens of the United States until after the death of Thomas H. Blythe" (St. Rec., fol. 29-31.)

* * * * * * * * * * * * * * * * * * *

"The said Superior Court assumed jurisdiction over said Florence and over the said subject matter, to-wit: said real estate, and proceeded to hear and determine the matters, in said petition and subsequently filed complaint of said Florence, and in substance and effect determined and adjudged that the said Thomas H. Blythe in his lifetime had adopted the said Florence as his daughter under and by virtue of the provisions of said Section 230 of said Civil Code, or had instituted her as his heir under and by virtue of the provisions of Section 1387 of said Code, notwithstanding the fact that the said Thomas H. Blythe was never in England after the birth of said Florence, nor was she ever in the United States until after his death" (St. Rec., 33-35).

The bill then proceeds to show that the Superior Court decreed in favor of the defendant in error Florence. In that regard, it states that,

"the said Superior Court, in giving its decision in favor of said Florence, and against said Abbie Ayres, James T. Blythe (father of plaintiff in error) and others, confined its decision to three questions:

"First, whether said Florence was the child of said Thomas H. Blythe? Second, whether or not the said Thomas H. Blythe in his lifetime had adopted and legitimated said Florence under and by virtue of Section 230 of the Civil Code of California? Third, whether or not said Thomas H. Blythe had in his lifetime instituted the said Florence as his heir under the provisions of Section 1387 of said Civil Code? All of which questions, and no other, said Superior Court decided in the affirmative and in favor of said Florence; and the plaintiff, upon his information and belief, states that said decision did not determine the question of heirship, title or interest in or to the

said real estate of the said Thomas H. Blythe, in California, for want of jurisdiction in said Court to determine that said Florence was or could be an heir to the real estate of said Thomas H. Blythe in California, or capable of inheriting the same in the absence of a treaty then in force between the United States and the United Kingdom of Great Britain and Ireland, therein giving to the said Florence the right to inherit the real estate of said Thomas H. Blythe. And in that behalf plaintiff states that the Legislature of the State of California had no power or authority to enact, nor did it enact, any law which would or was intended to, operate upon persons or things beyond the territorial limits of the United States, or under or by virtue of which a citizen of the United States could do any act or thing by which an illegitimate, unnaturalized alien child could be made capable of inheriting real estate of an intestate, who during all the time said acts and things were claimed to have been done, was living in the State of California, and who died in said State, nor did said Section 230 nor Section 1387 so operate. Nor did any Court of the State of California have jurisdiction to extend and make operative any law of the State of California beyond the territorial limits of the United States. Yet said Court did, without jurisdiction, decree said Florence to be the owner of said real estate by succession" (St. Record, 37-41).

The complaint then avers that an appeal was taken from said judgment, and the proceedings on appeal are stated as follows:

"from said judgment of said Superior Court, an appeal was taken to the Supreme Court of the State of California, when all the matters and things hereinbefore stated * * * were made plainly to appear to said Supreme Court * * * and therein showing that neither the said Superior Court nor said Supreme Court had jurisdiction to decide the matter in controversy involving the title and ownership to said real estate in said special proceeding in favor of the said Florence, nevertheless the said Supreme Court, without jurisdiction so to do, by a

bare majority of the Judges who heard said appeal on said special proceeding, and participated in the decision thereof, affirmed the judgment of said Superior Court upon the ground that the said Thomas H. Blythe had instituted said Florence as his heir under Section 1387, though he had not adopted her under said Section 230" (St. Rec., 44).

[Mem. This record shows, therefore, not only that the said claim of said Florence was set forth in the pleadings in said Superior Court, but was put in issue and actually litigated, and was, by said Court, adjudged in her favor, and was upon two distinct grounds: that an appeal was taken to the Supreme Court and that the decree was affirmed on one of the grounds, which, however, was amply sufficient to sustain the decree.]

The complaint then attacks the judgments rendered by the Superior Court and the Supreme Court of California alleging that they neither decide nor determine the question whether Sections 671 and 672 of the Civil Code of California, as applied to the claim of said Florence to take said real estate in California by descent, were, or were not, in violation of Section 10 of Article I of the Constitution (St. Rec., fol. 45); nor whether said Florence could take said real estate by descent in the absence of a treaty between the United States and Great Britain, enabling her to take said real estate; nor whether said Courts were or were not without jurisdiction to adjudge said real estate to said Florence upon her said claim as the heir of said Thomas H. Blythe, in the absence of a treaty between the United States and Great Britain, enabling her to take said real estate by succession; nor whether any statute passed by the State of California, purporting to enable a non-resident, illegitimate alien British subject, such as said Florence, to take real estate by succession, is not in violation of, and repug-

nant to Section 10 of Article I of the Constitution of the United States (St. Record, fol. 45-46).

[Mem. Sections 671 and 672 of the Civil Code of California are as follows:

> Sec. 671. "Any person, whether citizen or alien, may take, hold dispose of property, real or personal, within this State."
>
> Sec. 672. "If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in Title VIII, Part III, Code of Civil Procedure" (relating to escheat proceedings.]

The bill then proceeds and avers that the judgment and decision of the Supreme Court is null and void for want of jurisdiction.

This is all that the complaint has to say in derogation of the decree upon the proceedings to determine the heirship of the several persons laying claim to the estate of Thomas H. Blythe.

(2) The next muniment of title of defendant in error is the decree of distribution. The allegations as to the proceeding and the incantations against it are similar to those in relation to the first decree. It is alleged in the complaint that the said Florence did, on the 18th day of June, 1894, present her petition to the Superior Court of the City and County of San Francisco to have distributed to her the whole of said estate, real and personal, to which she was entitled, and, continuing, the complaint alleges:

> "Plaintiff states that in due time the said James T. Blythe (father of Boswell M. Blythe, plaintiff in error herein), who was then and there a person interested in said estate, namely, one of the next of kin and lawful heir of said Thomas H. Blythe, appeared in said last mentioned proceedings under and by virtue of the right given to him

so to do in said Section 1663, and did then and there resist the application of said Florence to have distributed to her any part or share of said estate, and in that behalf plaintiff states that it was made plainly to appear to said Court upon the face of the said petition of said Florence that the said Thomas H. Blythe was at and before his death, namely, on and ever after August 31, 1855, a naturalized citizen of the United States; that Florence was born in England on December 18, 1873, and was the illegitimate child of one Julia Perry, then an unmarried woman; that the said Thomas H. Blythe was never in England, nor in any other country in Europe, after August 29, 1873, nor was the said mother of said Florence, nor said Florence ever out of England, or within any part of the United States, or on the continent of America, until after the death of said Thomas H. Blythe and descent cast. And it was further made plainly to appear to said Court that the said Florence was born a subject of Victoria, Queen of Great Britain and Ireland, and always remained such subject until after the death of said Thomas H. Blythe; and that the law of the State of California, as embodied in Section 230 and 1387 of the Civil Code thereof, is not and never has been the law in the United Kingdom of Great Britain and Ireland, nor has there ever been in said United Kingdom any law of adoption, or any law by which an illegitimate child born and living in England could, by an acknowledgment in writing, or otherwise, be instituted as, or become the heir of any man living in or out of England, or any law by which an illegitimate child could be made legitimate or adopted as the child or heir of its putative father, all of which matters and things last alleged as appearing on the face of said petition this plaintiff alleges to be true in fact."

* * * * * * * * * * * * * * * * * * *

"Plaintiff further states and alleges that at the said hearing and trial of said petition the said Florence offered in evidence the entire record, including the judgments and decrees of said Superior Court and of said Supreme Court in the proceeding hereinbefore referred to as Blythe vs. Ayres" (St. Rec., fol. 66).

That the said James T. Blythe objected to the introduction of any of the said record upon the ground that the alleged judgment was illegal and unconstitutional and void for the reason that the Court had no jurisdiction, and that to render such judgment was to legislate judicially after descent cast, and to deprive James T. Blythe of his property without due process of law; and further it alleged

> "to deprive him of the equal protection of the law, in violation of the provisions of the Constitution of the United States, and particularly in violation of the provisions of Section 10 of Article I of said Constitution, and of the provisions of Section 1 of Article XIV of the Amendments thereto; that there was not at the time of the death of said Thomas H. Blythe, to-wit, April 4, 1883, nor at the time when said judgment was rendered, nor at the time of the trial before said Court, any law upon the statute books, or in the codes, or decisions of the Supreme Court of the State, authorizing the giving of, or giving to the said Court jurisdiction to give or make said alleged judgment upon the said facts" (St. Rec., fol. 68-70).

And the said Court thereafter, on June 18, 1894, did make and cause to be entered its decree distributing the said real estate to the said Florence, and caused the possession thereof to be delivered to her (St. Rec., fol. 72).

That thereafter James T. Blythe (father of plaintiff in error herein) appealed to the Supreme Court of the State of California from said decree, and while said appeal was so pending, and before a decision was made therein, the said James T. Blythe, the ancestor and father of this plaintiff, died; and that this plaintiff succeeded to the interest of his said father (St. Rec., fol. 74-75).

That the said Supreme Court did thereafter hear said appeal, and, on November 30, 1895, make a decision purporting to affirm said illegal and void judgment and thereafter sent its remittitur to said Superior Court; that on the 4th day of De-

cember, 1895, the possession of said real estate, and the whole thereof was delivered by the Court to the said Florence, pursuant to said illegal and void judgment; that said Florence, ever since said 4th day of December, 1895, has been and now is in possession of said real estate, and has been collecting the rents, issues and profits thereof (St. Rec. fol. 80). And continuing, it is averred upon information and belief,

> "that said Florence sets up and claims that she was entitled to inherit, and did, in fact, inherit the real estate of which said Thomas H. Blythe died seized by virtue of Section 671 of the Civil Code of California" (St. Rec., fol. 81).

Plaintiff alleges that said Section 671 was adopted and passed by the Legislature March 30, 1874; that thereafter, in 1879, the People of the State of California ordained a new Constitution for the said State, which became the organic law of the State January 1st, 1880, before the death of said Thomas H. Blythe (St. Rec., fol. 83).

The complaint then sets forth Section 16 of Article I of said Constitution, Section 22 of Article I, and Section 1 of Article XXII and continuing it is alleged that said Section 671 of the Civil Code was, and is an attempt on the part of the Legislature of California to invade the treaty making power of the United States, contrary to Section 10 of Article I of the Constitution of the United States; that Section 671 is void being inconsistent with Section 16 of Article I of said Constitution, and, therefore, said Section ceased to be a law of the State of California upon the adoption of said Constitution; that said Florence could not inherit said property under the provisions of Section 17 of Article I of said Constitution by reason of the fact that she was ineligible to become a citizen of the United States under the naturalization laws thereof; nor was she a *bona fide* resident of the State of California when the said Thomas H. Blythe died, and, therefore, his said real estate descended to his next of kin, includ-

ing the said James T. Blythe (father of plaintiff in error herein) (St. Rec., fols. 85-87).

It is further alleged that Section 17 of Article I of the Constitution of the State of California is void for that it attempts to invade the treaty making power of the United States, and is in violation of Section 10 of Article I of the Constitution of the United States (St. Rec., fol. 89). The complaint further states that the said Florence claims that she has a right to take said property by succession as heir of said Thomas H. Blythe by virtue of the provisions of Section 672 of said Civil Code of California; that said section is void because it encroaches upon the treaty making power of the United States, and is in conflict with Section 10 of Article I of the Constitution of the United States; that Thomas H. Blythe, at the time of his death, was the owner in fee, and seized and possessed of certain real estate mentioned in the complaint.

The complaint prays for the appointment of a receiver of the real property described in the complaint, and judgment that the plaintiff is the owner of the property in fee and quieting his title.

DEMURRER TO THE COMPLAINT.

The defendant Florence Blythe Hinckley demurred to the complaint upon various grounds,—among others, that the complaint did not state facts sufficient to constitute a cause of action; that plaintiff was estopped by the proceeding instituted and prosecuted under Section 1664 of the Code of Civil Procedure of the State of California, in the Superior Court of the City and County of San Francisco, where it was determined that said Thomas H. Blythe had adopted said defendant as his daughter under the provisions of Section 230 of the Civil Code, which said judgment of said Superior Court was finally determined upon appeal to the Supreme Court of California. See Blythe vs. Ayres, 96 Cal., 553.

That said plaintiff was estopped by the decree of distribution under Section 1663 of the Code of Civil Procedure made by the Superior Court of the City and County of San Francisco, State of California, and afterwards affirmed by the Supreme Court. See In Re Blythe, 112 Cal., 689.

That said complaint does not state facts sufficient to constitute a cause of action in that it appears upon the face thereof that defendant was instituted heir of said Thomas H. Blythe, deceased, under the provisions of Section 1387 of the Civil Code of the State of California.

The demurrer then specifies several grounds of uncertainty and ambiguity in said complaint, and ends with a prayer that the demurrer be sustained, and that plaintiff take nothing by his action, and for her costs and disbursements herein (St. Record, fol. 114-158).

The demurrer was sustained and judgment entered for the defendant. The Plaintiff appealed from said judgment, and thereafter such proceedings were had in the Supreme Court of the State of California that said judgment of the Superior Court was affirmed (see opinion of Supreme Court, 127 Cal., 431). The case was decided by the Supreme Court of the State of California on January 4, 1900.

The plaintiff in error filed his petition in the Supreme Court of the State of California, praying for a writ of error to this Court, which writ was granted.

The petition sets forth that the decision of the Supreme Court of California was a final judgment by the highest Court of the State, and alleges that there is drawn in question the validity of a statute of California, i. e., Section 671 of the Civil Code, which provides:

> Sec. 671. "Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State,"

and alleges that said provisions are repugnant to Section 10

of Article I of the Constitution of the United States, which reads as follows:

> "No State shall enter into any treaty, alliance or confederation. No State shall, without the consent of Congress * * * enter into any agreement with another State, or with a foreign power,"

on the ground that said Section 671 is repugnant to all the treaties which existed between the United States and Great Britain at the time of the death of Thomas H. Blythe and descent cast, and on the ground that said section is repugnant to Section 1978 of the Revised Statutes of the United States, and alleges that the State of California had no power to enact said statute contained in Section 671 of the Civil Code, and further alleges that the defendant in error was a non-resident alien at the time of descent cast.

It also alleges that there is drawn in question the validity of Sections 230 and 1387 of the Civil Code of California, on the ground that, as construed by the Supreme Court, they are repugnant to the said provisions of Section 10 of Article I of the Constitution of the United States, and that they are repugnant to the treaties existing between the United States and Great Britain. The petition also shows that the decision of the trial Court and of the Supreme Court of California was in favor of the validity of said statutes and of defendant's claim under them.

The Supreme Court of the State of California allowed a writ of error to this Court, and the plaintiff thereafter prepared and filed his assignments of error which were and are as follows:

"In the Supreme Court of the State of California.

BOSWELL M. BLYTHE,
Plaintiff and Appellant,

vs.

FLORENCE HINCKLEY,
Defendant and Respondent.

S. F. No. 1548.

"ASSIGNMENT OF ERRORS BY BOSWELL M. BLYTHE, ON HIS PETITION FOR WRIT OF ERROR.

I.

"The Court erred in deciding that Section 671 of the Civil Code of California, reading

"Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State," is an express removal of the common law disability of an alien to inherit land in this State, and that said section is not, in that respect, repugnant to the provisions of Section 10 of Article 1 of the Constitution of the United States, reading

"No State shall enter into any treaty, alliance or confederation * * * No State shall, without the consent of Congress * * enter into any agreement or compact with a foreign power."

II.

"The Court erred in deciding that California had the power to enact said Section 671, in its application to defendant, or to remove the common law disability of an alien as to the inheritance of land in California in the absence of a treaty or otherwise, in the face of the inhibition contained in said Section of the Constitution.

"The Court erred in deciding that the State of California had any power or jurisdiction to qualify a non-resident alien to take by inheritance real estate in California.

III.

"The Court erred in deciding that the said defendant Florence (who was at the time of the death of Thomas H. Blythe and descent of his estate cast a subject of Queen Victoria and an illegitimate minor child residing and domiciled in England) did or could take the land in California here involved by succession under and by force of said Section 671 of the Civil Code of California, in spite of said provisions of Section 10 of Article 1 of the Constitution of the United States.

IV.

"Said Court erred in deciding that defendant did take by inheritance the land here in controversy in California, solely under said Section 671 of the Civil Code of California notwithstanding the Court's opinion that the regulation of the descent of real property to aliens was and is within the treaty-making power of the United States.

"The Court erred in deciding that the very silence of the treaties existing between the United States and Great Britain upon the matter of giving to British subjects residing in England the right to inherit land in the United States is not equivalent to an express denial to British subjects of the right to inherit land within the United States.

"The Court erred in holding that defendant, a British subject, could take land by inheritance in California in the absence of a treaty between the United States and Great Britain enabling her so to do.

"The Court erred in deciding that there is no conflict arising between the provision contained in Section 671 of the Civil Code permitting defendant an alien to inherit land in California, and Section 10 of Article 1 of the Constitution of the United States; and that said Section 671, *quo ad that matter* is not void as an illegal attempt to en-

croach upon the exclusive prerogative of the Federal government to manage all its foreign relations.

"The Court erred in deciding that said Section 671 of the Civil Code, so far as it regulates the descent of real property to aliens, does not encroach upon the treaty making power of the United States.

"The Court erred in deciding that said Section 671 of the Civil Code of California in so far as it provides for the descent of real property to aliens is not repugnant to that provision of Section 10 Article 1 of the Constitution of the United States, which forbids the States to enter into any agreement or compact with a foreign power, without the consent of Congress.

V.

"The Court erred in deciding that said Section 671 of the Civil Code of California is not repugnant to all of the existing treaties concluded between the United States and Great Britain; because in them the United States did not extend to British subjects (but refrained from extending to them) the privilege of inheriting land within the United States.

"Said Court erred in deciding that said Section 671 of the Civil Code of California is not repugnant to Section 1978 of the Revised Statutes of the United States; for, while said Section of the laws of the United States insures to all citizens of the United States the same right in every State and territory as is enjoyed by the white citizens thereof to inherit real property, yet said Section 671 of the Civil Code of California, as construed by the Court neutralizes said Section 1978 of the U. S. Revised Statutes in California by giving that same right to inherit land, not only to all citizens of the United States, but to all aliens the world over; and as applied in this case said Section of the California Code extended that right of inheritance to a British subject residing in England, who was also an illegitimate child, to whom even English laws did not extend the right of inheritance.

"The Court erred in deciding that Section 230 of the Civil Code of California reading:

"'The father of an illegitimate child, by publically acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of the birth.' In its application to defendant Florence (an English subject and an illegitimate minor child, residing in England until after the time of descent cast), and with respect to whom claims to have been adopted under it, and therefore to have inherited and taken by succession under said section the land here involved—is not in conflict with the provisions of any treaty then existing between the United States and Great Britain, and is not an invasion of the treaty-making powers of the United States government; and is not repugnant to Section 10 of Article 1 of the Constitution of the United States.

"The Court erred in deciding that Section 1387 of the Civil Code of California, reading 'Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock'; or any action of Thomas H. Blythe under it relating to her operated upon defendant Florence (an English subject, and an illegitimate minor child residing in England until after the time of descent cast), and is not repugnant to Section 10 of Article I of the Constitution of the United States; and that, as applied to defendant by the Court, said Section was not an encroachment upon the diplomatic jurisdiction of the Federal government; and is not in conflict with the provisions of any treaty then existing between the United States and Great Britain; and is not an invasion of the treaty-making power of the United States.

"The Court erred in deciding that Sections 230 and 1387 of the Civil Code of California above set forth, op-

erated to clothe defendant with capacity to take the land here in controversy by inheritance.

"The Court erred in deciding that the adoption of defendant by Thomas H. Blythe, under Section 230 of the Civil Code, or the institution of defendant as an heir by Thomas H. Blythe, under Section 1387 of the Civil Code of California, was the legal equivalent of a treaty enabling her to take said land by inheritance.

"The Court erred in deciding that Sections 230 and 1387 of the Civil Code of California operated within the field of foreign relations of the United States government, and outside of the geographical boundaries of the State of California, and as so operating were not repugnant to the Constitution of the United States.

"The Court erred in deciding that said Sections 230 and 1387 of the Civil Code of California were not limited in their terms and their constitutional operation to the geographical limits but to the citizens of California.

"The Court erred in deciding that Section 1664 of the Code of Civil Procedure of California enabled defendant, in lieu of a treaty, to institute a suit in any Court of California to recover land under claim of succession thereto; and that said section, as construed by the Supreme Court, and with regard to defendant's claim made thereunder, is not repugnant to said provisions of Section 10 of Article I of the Constitution of the United States, and is not repugnant to all the existing treaties of the United States with Great Britain; and is not repugnant to Section 1789 of the Revised Statutes of the United States.

"The Court erred in deciding that the Superior Court of California, sitting in probate or otherwise, had any jurisdiction to entertain the claim of said defendant to the real property involved.

"The Court erred in holding that any law of California clothed defendant with any right to inherit land in California, or to sue to recover land under a claim thereto by inheritance.

"The Court erred in deciding that all the alleged adjudications in favor of defendant by the Courts of California were not void for want of jurisdiction in the State of California to bestow upon her any right to the land.

"The Court erred in deciding that the State of California could and did clothe defendant, a non-resident alien, with the fee simple title to land by succession (thereby giving to her the right to live thereon forever) in the face of the conceded power of the United States to remove and exclude defendant from the United States without assigning any reason therefor.

"Said Court erred in giving judgment herein against this plaintiff and in favor of defendant.

"Said Court erred in not giving judgment in favor of this plaintiff and against defendant.

"WHEREFORE plaintiff, this petitioner, prays the judgment of the Hon. Supreme Court of the United States reversing the judgment herein; and for costs.

"And since the infirmity of alienage existing in defendant's case, is a matter which cannot be denied or voided by her, but must be fatal to her claims, if plaintiff's constitutional objection is well taken, plaintiff asks that, with the reversal of the judgment, this Court make an order directing the Court below to enter a final judgment for the plaintiff.

S. W. HOLLADAY,
E. BURKE HOLLADAY,
Attorneys for Plaintiff in Error."

The Transcript has a sufficient statement of the case, but it will perhaps be of assistance to the Court in the examination of the record if we give a brief statement of the case, the statutory and constitutional provisions which may require its attention, together with the settled construction thereof, avoiding as much as possible controverted questions.

JURISDICTION OF THE SUPERIOR COURT.

The State Constitution (Art. VI, Sec. 6) provides (with certain exceptions not material here):

> "There shall be in each of the organized counties, or cities and counties, of the State, a Superior Court, for each of which at least one judge shall be elected."

It expressly provides (Art. VI, Sec. 12) that such Courts "shall be Courts of Record," and defines their jurisdiction as follows:

> Sec. 5 (Art. VI). "The Superior Court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; *of all matters of probate;* of divorce and for annulment of marriage, and of all such special cases and proceedings as are not otherwise provided for. And said Court shall have the power of naturalization, and to issue papers therefor. They shall have appellate jurisdiction in such cases arising in Justices' and other inferior Court in their respective counties as may be prescribed by law. They shall be always open (legal holidays and non-judicial days excepted), and their process shall extend to all parts of the State; provided, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate or any part thereof affected by such action or actions is situated. Said Courts and their Judges, shall have power to issue writs af mandamus, certiorari, prohibition, quo warranto, and habeas corpus, on petition by or on behalf of any person in actual custody in their re-

spective counties. Injunctions and writs of prohibition may be issued and served on legal holidays and non-judicial days."

Under these provisions, it is settled that the Court, sitting in probate, is a Court of general jurisdiction, with ample equity powers in probate matters, and that its decisions are final and conclusive.

Heydenfeldt vs. Superior Court, 117 Cal., 348;
Ions vs. Harbison, 112 Cal., 268;
Burris vs. Kennedy, 108 Cal., 331;
Estate of Moore, 96 Cal., 528;
In re Burton, 93 Cal., 459;
Blythe vs. Hinckley, 173 U. S., 497;
Burris vs. Kennedy, 108 Cal., 331-336;
The William Hill Company vs. Lawler, 116 Cal., 359;
Crew vs. Pratt, 119 Cal., 139;
Goad vs. Montgomery, 119 Cal., 552;
Trust of Trescony, 119 Cal., 568;
Jewell vs. Pierce, 120 Cal., 79;
Seymour vs. McAvoy, 121 Cal., 438;
Cunha vs. Hughes, 122 Cal., 111;
McKenzie vs. Budd, 125 Cal., 600;
Broderick's Will, 21 Wall., 503;
Toland vs. Earl, 61 Pac., Rep., 914.

All deraignment of title to the property of deceased persons is through decree of distribution entered as a final act in the administration of an estate.

Toland vs. Earl, 61 Pac., 914;
Goad vs. Montgomery, 119 Cal., 552.

The same was true (since 1858) of the Probate Courts prior to the Constitution of 1879, although the latter Courts were of more limited powers.

Robinson vs. Fair, 128 U. S., 153;
Estate of Twombley, 120 Cal., 350;
Irwin vs. Scriber, 18 Cal., 499;
Halleck vs. Moss, 22 Cal., 275-6.

The question as to which of the Superior Courts of the State is to take jurisdiction of an estate is regulated by the following provision of the Code of Civil Procedure:

Sec. 1294. "Wills must be proved, and letters testamentary or of administration granted:

"1. In the County of which the decedent was a resident at the time of his death, in whatever place he may have died;

"2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the State;

"3. In the county in which any part of the estate may be, the decedent having died out of the State, and not resident thereof at the time of his death;

"4. In the county in which any part of the estate may be, the decedent not being a resident of the State, and not leaving estate in the county in which he died;

"5. In all other cases, in the county where application for letters is first made."

The decision of the Court as to the existence of the jurisdictional fact of residence cannot be attacked collaterally.

Re Griffith, 84 Cal., 110.

[Mem.: There is no dispute as to the existence of the required jurisdictional facts here. The complainants themselves aver them. The bill expressly states that Thomas H. Blythe was, at the time of his death, a resident of the City and County of San Francisco, and that he left estate therein.]

SCOPE AND EFFECT OF THE PROBATE PROCEEDINGS.

Probate proceedings of the kind provided for in California have been held to be in the nature of proceedings *in rem.*

The William Hill Co. vs. Lawlor, 116 Cal., 359;
Kearney vs. Kearney, 72 Cal., 393;
State vs. McGlynn, 20 Cal., 269;
Broderick Will Case, 21 Wall., 509;
Grignon's Lessee vs. Astor, 2 How., 338;
Tompkins vs. Tompkins, 1 Story, 547.

In our State real and personal property are on substantially the same basis, so far as concerns administration of the estates of decedents; and there is very little difference in the administration or proceedings between cases where there is a will and cases where there is none. In the case of a will, the document must be filed, with a petition for its admission to probate, and thereupon a day is fixed for the hearing, and it is made the duty of the clerk to give notice of such hearing by publication and by mail in the manner specified in the Code. If there be no will, the proceedings are instituted by the filing of a petition for letters of administration. The provisions of the Code of Civil Procedure in this latter regard are as follows:

Sec. 1371. "Petitions for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the Clerk of the Court, stating the facts essential to give the Court jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residences of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterwards proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments."

Sec. 1373. "When a petition praying for letters of administration is filed, the Clerk must give notice thereof, by causing notices to be posted in at least three public

places in the county, one of which must be at the place where the Court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing."

(Compare Re Griffith, 84 Cal., 109.)

Sec. 1374. "Any person interested may contest the petition by filing written opposition thereto, on the ground of the incompetency of the applicant, or may assert his own rights to the administration, and pray that letters be issued to himself. In the latter case the contestant must file a petition and give the notice required for an original petition, and the Court must hear the two petitions together."

Sec. 1375. "On the hearing, it being first proved that notice has been given as herein required, the Court must hear the allegations and proofs of the parties, and order the issuance of letters of administration to the party best entitled thereto."

Sec. 1378. "Before letters of administration are granted on an estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others, and the Court may also examine any other person concerning the time, place and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose."

The decree appointing an administrator is not only conclusive as against a collateral attack, Irwin vs. Schreiber, 18 Cal., 499; Re Griffith, 84 Cal., 110; but is an adjudication which is binding by way of estoppel as to every matter involved in it, as, for example, the right to inherit, when involved in the right to administer.

Garwood vs. Garwood, 29 Cal., 515;
Estate of Pico, 56 Cal., 411;
Howell vs. Budd, 91 Cal., 349.

After the executor or administrator is appointed, it is his duty to take possession of all the assets of the deceased, cause to be made an inventory and appraisement thereof, and must administer the same under the direction of the Court, and account to it for his actions, until the purposes of the administration have been accomplished.

Speaking generally, the purposes of administration are the preservation of the property and the application of the same to the payment of the creditors, so far as may be required, and the distribution of the remainder, if any, to those entitled either by a will or the laws as to succession. It is not material to consider the case of creditors. It may be remarked in passing, however, that all creditors, even those whose claims are contingent, are required to present sworn claims to the executor or administrator within ten months after the first publication of notice to creditors, if the estate exceed ten thousand dollars in value, and within four months if of less value. If the claim be allowed by the executor or administrator, it must then be presented to the Judge, and if it receives his approval it is filed in the Court, and is "ranked among the acknowledged debts of the estate, to be paid in due course of administration." Even claims involved in pending suits must be presented (C. C. P., Sec. 1502). So must judgments entered against the deceased in his lifetime, and no execution can issue upon such judgments except on judgments "for the recovery of real or personal property or the enforcement of a lien thereon" (C. C. P., Secs. 1505 and 686). If a claim be not presented within the required time, it "is barred forever" (C. C. P., Sec. 1493). If either the executor or administrator reject a claim, the claimant must bring suit thereon "within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred" (C. C. P., Sec. 1498). A money judgment against an executor or administrator in any such suit, "only establishes the claim in the same manner as if it had been allowed by the executor

or administrator and a judge; and the judgment must be that "the executor or administrator pay in due course of administration the amount ascertained to be due." No execution can issue on such judgment, nor does it create any lien on the property of the estate, or give any priority (C. C. P., Sec. 1504).

In short, the property of the decedent is *in gremio legis*. The Court may, in proper cases, order its sale, and may marshall the assets, and has full equity powers for the purposes of the probate administration, and it may accord a jury trial to the parties entitled thereto. In all its proceedings, whether for the purpose of satisfying creditors or of distribution to heirs, the rules of practice in ordinary cases apply, as far as applicable, to probate proceedings (C. C. P., Sec. 1713), and this includes the practice as to new trials and appeals (C. C. P., Sec. 1714).

When the claims of creditors are all satisfied, what remains of the property is distributed to the persons entitled by will or succession. Three methods are provided for the adjudication of the rights of such persons.

THE PROCEEDING TO DETERMINE HEIRSHIP.

The first method may be resorted to before the estate is ready for distribution, and is in effect a mode of settling the question in advance. The provision of the Code of Civil Procedure in regard to this method is as follows:

Sec. 1664. "In all estates now being administered, or that may hereafter be administered, any person claiming to be heir to the deceased or entitled to distribution in whole or in any part of such estate, may, at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the Court to ascertain and declare the rights of all persons to said estate and all the interests therein, and to whom distribution thereof should be made. Upon the filing of such petition, the Court shall make an order directing service

of notice to all persons interested in said estate to appear and show cause, on a day to be therein named, not less than sixty days nor over four months from the date of the making of such order, in which notice shall be set forth the name of the deceased, the name of the executor or administrator of said estate, the names of all persons who may have appeared claiming any interest in said estate in the course of the administration of the same, up to the time of the making of said order and such other persons as the Court may direct, and also a description of the real estate whereof said deceased died seized or possessed, so far as known, described with certainity to a common intent; and requiring all said persons, and all persons, named or not named, having or claiming any interest in the estate of said deceased, at the time and place in said order specified, to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership, or interest in said estate, to said Court, which notice shall be served in the same manner as a summons in a civil action; upon proof of which service, by affidavit or otherwise; to the satisfaction of the Court, the Court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate and the title and ownership of said property. The Court shall enter an order or decree establishing proof of the service of such notice. All persons appearing within the time limited, as aforesaid, shall file their written appearance in person or through their authorized attorney, such attorney filing at the same time written evidence of his authority to so appear, entry of which appearance shall be made in the minutes of the Court and in the register of proceedings of said estate. And the Court shall, after the expiration of the time limited for appearing as aforesaid, entering an order adjudging the default of all persons for not appearing as aforesaid, who shall not have appeared as aforesaid. At any time within twenty days after the date of the order or decree of the Court establishing proof of the service of such notice, any of such persons so appearing may file his complaint in the

matter of the estate, setting forth the facts constituting his claim of heirship, ownership, or interest in said estate, with such reasonable particularity as the Court may require, and serve a copy of the same upon each of the parties or attorneys who shall have entered their written appearance as aforesaid, if such parties or attorneys reside within the county; and in case any of them do not reside within the county, then service of such copy of said complaint shall be made upon the Clerk of said Court for them, and the Clerk shall forthwith mail the same to the address of such party or attorneys as may have left with said Clerk his postoffice address. Such parties are allowed twenty days after the service of the complaint, as aforesaid, within which to plead thereto, and thereafter such proceedings shall be had upon such complaint as in this code provided in case of an ordinary civil action; and the issues of law and of fact arising in the proceeding shall be disposed of in like manner as issues of law and fact are herein provided to be disposed of in civil actions, with a like right to a motion for a new trial and appeal to the Supreme Court; and the provisions in this Code contained regulating the mode of procedure for the trial of civil actions, the motion for a new trial of civil actions, statements on motion for a new trial, bills of exception and statements on appeal, as also in regard to undertakings on appeal, and the mode of taking and perfecting appeals, and the time within which such appeals shall be taken, shall be applicable thereto; provided, however, that all appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of. The party filing the petition as aforesaid, if he file a complaint, and if not, the party first filing such complaint, shall, in all subsequent proceedings, be treated as the plaintiff herein, and all other parties so appearing shall be treated as the defendants in said proceedings, and all such defendants shall set forth in their respective answers the facts constituting their claim of heirship, ownership, or interest in said estate, with such particularity as the Court may require, and serve a copy thereof on the plaintiffs. Evidence in support of all issues may be taken orally or by depositions,

in the same manner as provided in civil actions. Notice of the taking of such depositions shall be served only upon the parties or attorneys of the parties so appearing in said proceedings. The Court shall enter a default of all persons failing to appear or plead or prosecute or defend their rights, as aforesaid; and upon the trial of the issues arising upon the pleadings in such proceedings, the Court shall determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof, and the final determination of the Court thereupon shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property of the estate of said deceased. The cost of the proceedings under this section shall be apportioned in the discretion of the Court. In any proceeding under this section, the Court may appoint an attorney for any minor mentioned in said proceedings not having a guardian. Nothing in this section contained shall be construed to exclude the right, upon final distribution, of any estate to contest the question of heirship, title, or interest in the estate so distributed, where the same shall not have been determined under the provisions of this section; where such questions shall have been litigated under the provisions of this section, the determination thereof as herein provided, shall be conclusive in the distribution of said estate."

The averments of the pleading of plaintiff in error in relation to the proceedings in the estate of Thomas H. Blythe, under the provisions just quoted have already been referred to (pp. 11 to 15 hereof). The first appeal to the Supreme Court from the decree of the Superior Court mentioned in the complaint of plaintiff in error was taken by a set of claimants known as the "Williams heirs." Counsel for the other claimants (including James T. Blythe, father of plaintiff in error herein), were heard as *amici curiæ*, but were parties to that appeal and such appears by the complaint herein which makes

that decision a part of the complaint (St. Rec., fol. 49). The result of the appeal was the affirmance of the decree of the Superior Court, upon the ground that the deceased had instituted defendant in error Florence his heir.

Blythe vs. Ayres, 96 Cal., 532.

The matter was again brought before the Court upon appeal from the judgment under Section 1664 of the Civil Code of California and an order denying a motion for a new trial of The Blythe Company and others, including James T. Blythe (their case being disposed of with seven others by authority of case cited next below, see cases not reported, p. XVII, 102 Cal. R.), father and ancestor of plaintiff in error herein, and the Court approved and followed its previous decision; but, in addition to the grounds there adjudged, held that the several appellants had no standing, because they had not attacked the finding that they or their assignors were not of kin to the deceased, but were mere strangers, and hence it made no difference to them whether the defendant in error was entitled or not.

Blythe vs. Ayres, 102 Cal., 254.

This decision was approved upon a subsequent appeal, by an alleged wife of the deceased, from the same decree.

Hinckley vs. Ayres, 105 Cal., 358.
Blythe vs. Ayres, 102 Cal., 262.

The matter again came before the Supreme Court of the State of California upon an application to dismiss the proceeding to determine heirship. The motion was denied.

Re Blythe, 110 Cal., 226.

THE DECREE OF DISTRIBUTION.

The second method in which the question of the right of defendant in error to inherit the property of Thomas H. Blythe, deceased, was adjudicated was the decree of distribution of the Superior Court.

The question of a claimant's right to inherit may be litigated and determined on an application for distribution.

Re Jessup, 81 Cal., 408.

The petition for distribution was based on Sec. 1663 of the C. C. P. The section is as follows:

> Sec. 1663. "At any time after the lapse of one year from the issuance of letters testamentary, or of administration, any heir, devisee, or legatee may present his or her petition to the Court for the distribution of the net proceeds of the share of the said estate to which he or she will be entitled. Notice of the application must be given, as required by Section sixteen hundred and fifty-nine. The executor or administrator, or any other person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself. If at the hearing it appears that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the Court must make an order in conformity with the prayer of the applicant, requiring:
>
> "1. Each heir, legatee, or devisee, obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the Court, or a Judge thereof, with sureties to be approved by the Judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the amount or portion of the proceeds of the estate which he has received; provided, that where the time for filing or presenting claims has expired, and all claims that have been allowed have been paid, or are secured by mortgage

upon real estate sufficient to pay them, and the Court is satisfied that no injury can result to the estate, the Court may dispense with the bond."

"2. The executor or administrator to deliver to the heir, legatee, or devisee the proceeds of the estate to which he may be entitled, or only a part thereof, designating it. If in the opinion of the Court, it be necessary, in order to ascertain the proceeds that any or all of the heirs, legatees, or devisees may be entitled to that the interest of any heir, legatee or devisee in one or more pieces or parcels of property of the estate shall be determined or ascertained, the Court may suspend proceedings and direct the petitioner or petitioners to take proceedings under Section sixteen hundred and sixty-four of the Code to ascertain the interest the petitioner or petitioners will have under the will in any piece or parcel of property. The order must describe the property in relation to which proceedings are to be taken. Whenever any bond has been executed and delivered, proceedings upon any such bond may be taken under Section sixteen hundred and sixty-two. The cost of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally between them."

The averment of the complainant's pleadings in relation to the proceedings on distribution have been already referred to (pp. 15 to 18 hereof.

And the appeal must be taken within sixty days.

C. C. P., Sec. 1715.

It is shown by the pleadings that an appeal was taken by James T. Blythe (father of plaintiff in error herein) and others to the Supreme Court of the State of California; and that the Supreme Court affirmed the decision of the lower Court.

Re Blythe, 110 Cal., 227; also see 115 Cal., 553.

And as the Court will notice, thereafter there was sued out a writ of error to this Court on said judgment, and that such writ was by this Court dismissed "for want of jurisdiction."

Blythe vs. Hinckley, 167 U. S., 746.

ARGUMENT.

We shall argue:

I. That this Court has no jurisdiction for that no federal question is involved.

II. That the decisions of the State Court are conclusive against the contention of plaintiff in error, and cannot be attacked in the present suit, and that the State laws permitting aliens to inherit are not in conflict with any treaty or in violation of any treaty making power, or in violation of any federal constitutional provision.

III. According to the laws of the State of California, the defendant in error was entitled to inherit her father's estate whether she was an alien or not.

IV. That the power or right to adopt a child depends upon the law of the country of the domicile of the father, irrespective as to the place of birth or the original citizenship of the child.

V. That the question of kinship of plaintiff in error to Thomas H. Blythe was involved and determined in Blythe vs. Ayres, 96 Cal., 532, decided Nov. 30, 1892, and in Blythe vs. Ayres, 102 Cal., 254, decided April 24, 1894; that such decisions have become final and operate to estop plaintiff in error in this action.

VI. The decision of the State Court sought to be reviewed.

I.

THIS COURT HAS NO JURISDICTION FOR THAT NO FEDERAL QUESTION IS INVOLVED.

(a) The only Constitutional provision which is referred to or with which any averment has the remotest connection is Section 10 of Article I, which provides that "no State shall enter into any treaty alliance, or confederation." We have already shown that the sections of the California Code permitting aliens to inherit, and providing for the institution of heirship, do not constitute a treaty, and are not, in any view, an invasion of the treaty making power. If this be so, the claim that the constitutional provision referred to is involved, is merely frivolous and fictitious.

> Wilson vs. North Carolina, 169 U. S., 595;
> New Orleans vs. N. O. Water Works, 142 U. S., 87;
> Hamblin vs. Western Land Co., 147 U. S., 532.

It is well settled that a constitutional question must be a real and substantial one.

> New Orleans vs. Benjamin, 153 U. S., 424.

Even if the Code provisions referred to were in violation of a treaty that would not involve a constitutional question, for, as already shown, a treaty stands on the same footing as an Act of Congress.

> Fong Yue Ting vs. U. S., 143 U. S., 571;
> Chinese Exclusion Cases, 130 U. S.,600.

And if it be said that the Code deals with subjects which might be the subject of a treaty, the answer is that that does not make the question a constitutional one, any more than a State statute could be said to involve a constitutional question because it dealt with a subject which *might* be the subject

of an Act of Congress. The constitutional question must not be remotely or collaterally involved. *It must be controlling.*

Carey vs. Houston Ry., 150 U. S., 181.

(b) The ruling of a State Court that a state law does not violate the state constitution, is conclusive upon the Supreme Court of the United States.

Gut vs. Minnesota, 9 Wall., 35.

"The rule of construction adopted by the highest court of the State in construing their own constitution, and one of their own statutes, in a case not involving any question re-examinable in this court under the 25th Section of the Judiciary Act, must be regarded as conclusive in this Court."

Provident Savings Inst. vs. Mass., 6 Wall., 611; citing:
McCutchen vs. Marshall, 8 Pet., 240;
Bank of Hamilton vs. Dudley, 2 Pet., 499;
Leffingwell vs Warren, 2 Black, 599.

It is said in the opinion in Elmwood vs. Marcy, 2 Otto, 289:

"We have always followed the hightest court of the state in its construction of its own constitution and laws."

In Chambers vs. Clews, 21 Wall., 317, it was held that the decision of the Supreme Court of Alabama upon the constitutionality of an act of the legislature authorizing the issuing of certain bonds, was binding upon the Supreme Court of the United States.

Whether the statutes of a state have been duly enacted in accordance with the requirements of the constitution of such state, is not a Federal question, and the decision of state courts as to what are the laws of the state is binding upon the courts of the United States.

Leeper et al. vs. State of Texas, 139 U. S., 462.

Alleged errors of the State Courts which involve questions either of fact or of state, and not federal law, are not reviewable in the United States Supreme Court on writ of error.

Quimbey et el. vs. Boyd et al., 128 U. S., 488.

The United States Supreme Court has no jurisdiction of the questions whether a state act is consistent with the constitution of the state.

Medberry vs. Ohio, 24 How., 413.
Salomon vs. Graham, 15 Wall., 208.

A question of state law alone does not present a federal question so as to give the Supreme Court of the United States jurisdiction over a state judgment. The judgment of the state court is final.

Nonconnah Turnpike Co. vs. Tennessee, 24 Law Ed., U. S., 368.
Palmer vs. Marston, 14 Wall., 10.
Sevier Adm'r vs. Haskell, 14 Wall., 12.

A controversy where no right is claimed under the constitution or laws of the United States, but which depends on State laws and proceedings, is exclusively within the jurisdiction of the State Court.

Congdon vs. Goodman, 2 Black, 574.

II.

THE DECISIONS OF THE STATE COURTS ARE CONCLUSIVE AGAINST THE CONTENTION OF PLAINTIFF IN ERROR AND CANNOT BE ATTACKED IN THE PRESENT SUIT, AND THE STATE LAWS PERMITTING ALIENS TO INHERIT ARE NOT IN CONFLICT WITH ANY TREATY, OR IN VIOLATION OF ANY TREATY MAKING POWER, OR IN VIOLATION OF ANY FEDERAL CONSTITUTIONAL PROVISION.

The judgments of the State Courts are conclusive against the right of plaintiff in error to maintain this suit.

The following proposition cannot be denied, viz: that the Superior Court of San Francisco is a Court of general jurisdiction; that the said Superior Court is the only State Court authorized to take original jurisdiction of "matters of probate"; that, inasmuch as it is expressly averred that Thomas H. Blythe died a resident of the City and County of San Francisco, and left estate therein (State Record, Trans. fol. 5), the Superior Court of San Francisco had jurisdiction to administer on his estate; that said Superior Court *three* times decreed that Thomas H. Blythe had instituted defendant in error his heir; that these decrees were repeatedly affirmed by the highest court of the State; that, so far as the State law can make them so, such decrees are final and conclusive; that no sort of fraud, concealment, or unfairness in the proceedings before any of the State Courts is charged by the plaintiff in error; but, on the contrary, it is expressly averred that the fact of the non-resident alienage of the defendant in error Florence at the time of descent cast "was made plainly to appear" to the State Courts.

And as further evidence that this precise question was before the State Court, and actually passed upon, we direct at-

tention to the first of the series of appeals brought before the Supreme Court of California, where the Court said in Blythe vs. Ayres, 96 Cal., Op., 558:

"The principles of law and the facts of the case bearing upon her contention under these respective provisions of the code are entirely dissimilar, involving a separate discussion; and in the construction of Section 230, our investigation also necessarily divides itself into two distinct branches.

"1. Was plaintiff so domiciled with relation to her father's domicile as to have rendered any action of his looking to adoption available for that purpose? or, placing the interrogatory in the clear and emphatic language of appellants' counsel (to which interrogatory they all with great confidence give answer, Yes). Was she so domiciled or so situated that she could not be subject to the laws of California, and be by those laws transmuted from bastardy to legitimacy?

"2. If her situation endowed her with the capacity for legitimation, did the acts of Blythe bring her within the requirements of the statute?

"The facts found by the Court which face us while we are engaged in a consideration of the first branch of this subject may be succintly and substantially stated as follows:

"1. That plaintiff was born in England, upon December 18, 1873, and was the issue of Thomas H. Blythe and Julia Perry;

"2. That Julia Perry was a native of England, domiciled therein, and continued to there reside until one month after the death of said Blythe;

"3. That plaintiff remained in England until after the death of Blythe, when she came to California, and said Blythe was never at any time within any of the countries of Europe after the twenty-ninth day of August, 1873;

"4. That said Blythe was a citizen of the United States, and of the State of California, domiciled in said State, and died intestate therein, April 4, 1883, leaving surviving him no wife, no father, no mother, and no child, save and except said Florence Blythe, the plaintiff herein;

"5. That said Thomas H. Blythe and said Julia Perry never were married, and said plaintiff was begotten while said Blythe was temporarily sojourning in England, and was born after said Blythe's return to California, and that said Blythe never was married."

Such being the case, the question suggests itself as to why these adjudications of the State Court should be treated as absolute nullities and void on a collateral attack, such as is attempted to be made by the plaintiff in error here.

The principal contention of the plaintiff in error is that the State statute permitting aliens to inherit is in conflict with the State Constitution. The provision of the Constitution of 1849 was as follows:

Sec. 17 (Art. 1). "Foreigners who are or who may hereafter become bona fide residents of the State shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens."

The construction which this received was that the alien must be a resident at the time of descent cast (Farrell vs. Enright, 12 Cal., 450); but that the Constitution was not a grant of, but a limitation upon legislative power, and that the Legislature could extend privileges to aliens who did not come within the class designated by the Constitution, and that, consequently, the Legislature could permit non-resident aliens to inherit if they appeared and claimed the property within a fixed period.

People vs. Rodgers, 13 Cal., 160.

In 1874, the Legislature enacted the Civil Code, which contains the following provisions:

Sec. 671. "Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State" (in effect July 1, 1874).

Sec. 672. "If a non-resident alien takes by succession, he must appear and claim the property within five years

from the time of succession or be barred. The property, in such case, is disposed of as provided in Title VIII, Part III, Code of Civil Procedure" (escheat).

Sec. 1404. "Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

These provisions have not been repealed. In 1879, the State adopted a new Constitution which contained the following provision (supposed to have been aimed by its sponsors at Mongolians):

Sec. 17 (Art. 1). "Foreigners of the white race or of African descent, eligible to become citizens of the United States, under the naturalization laws thereof, while bona fide residents of this State, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission and inheritance of property as native-born citizens."

But the same construction was given this as was given to the corresponding provision in the preceding Constitution, i. e., that it was a limitation upon, and not a grant of, legislative power, and that, under the Code provisions above quoted, aliens could inherit.

State vs. Smith, 70 Cal., 153;
Estate of Billings, 65 Cal., 593;
Lyons vs. The State, 67 Cal., 380;
Carrascos vs The State, 67 Cal., 385.

These decisions were cited to the State Supreme Court, upon the appeal from the decree of heirship (see 96 Cal., 543), and, as we are informed by the bill here, the fact of non-resident alienage was "made plainly to appear" (Tr. St. Rec., p. 9). It is

manifest that the construction of the cases cited is correct; for State Constitutions are considered as limitations upon, and not as grants of, legislative power (Giozza vs. Tiernan, 148 U. S., 661). And Section 22 of Article I, providing that the various provisions of the Constitution shall be regarded as "mandatory and prohibitory," has not the slightest bearing upon the scope of the various provisions. Its only purpose was to prevent any provision from being held to be "directory" merely, a construction which had, in some instances, been given to constitutional provisions.

But, whether the construction of the State Court was right or not, it is nevertheless the settled construction of that Court; and the Federal Courts are bound by that construction. The decisions of this Court make it clear that it will not enquire whether a State statute is in conflict with the State Constitution.

> Long Island Co. vs. Brooklyn, 166 U. S., 688;
> Adams Express Co. vs. Ohio, 165 U S., 219;
> Norton vs. Shelby County, 118 U. S., 439;
> Fallbrook Ir. Co. vs. Bradley, 164 U. S., 154;
> Miller vs. Cornwall Ry. Co., 166 U. S., 519;
> Stutsman vs. Wallace, 142 U. S., 306;
> Gut vs. The State, 9 Wall., 35.

It is next alleged that Section 671 of the Civil Code "was and is an attempt on the part of the Legislature of the State of California to invade and encroach upon the treaty making power of the United States," contrary to, and in violation of Section 10 of Article I of the Constitution of the United States.

There is no actual treaty referred to. The only provision of the federal Constitution referred to in the complaint is Section 10 of Article I, providing that "no State should enter into any treaty, alliance, or confederation." It would seem ludicrous to say that the Code provisions referred to constitute a treaty. They no more constitute a treaty than they constitute an alliance or a confederation. And, notwithstanding some of the

language of the complaint, we hardly think that the contention is that the legislative provisions in question constitute a treaty. The idea seems to be that they deal with subjects which either are or might be regulated by a treaty; and that, for that reason, they are not only void, but infect with invalidity the judgments of Courts of general jurisdiction based upon them.

If it is necessary to do more than state such wild imaginings, we would submit, first, that there is no treaty covering the case; second, that said legislative provisions are not an invasion of the treaty-making power; and, third, that even if said provisions were an invasion of the treaty-making power, or a violation of an existing treaty, it would not make void the judgments of State Courts of general jurisdiction. We proceed to consider these propositions separately.

a. There is no treaty which covers the case. The complaint avers that the defendant in error was at the time of descent cast a British subject. No treaty is mentioned, and there is none which covers the case. Nor have we any reason to suppose from the course of the litigation up to this point that it will be claimed that any such treaty exists.

If there was any treaty on this subject, it would be in our favor. For no nation—and certainly not Great Britain—would be guilty of the barbaric folly of stipulating for the imposition of disabilities upon her own subjects.

b. The provisions of the Code are not an invasion of the treaty making power. If the provisions of the California Code permitting aliens to inherit are an invasion of the treaty making power, and for that reason void, it must follow that any State provision on the subject would be equally void for the same reason. In other words, if a provision permitting aliens to inherit be an invasion of the treaty making power, a provision forbidding aliens to inherit must be so too. In still other words, any provision on the subject, one way or

the other, must be void. Now it would not increase the power of the State that it adopted other provisions along with the forbidden provision. If it has no power to adopt such a provision by itself, it has no power to adopt it as a part of a system. The necessary result of the position of plaintiff in error would be that there is not, and never has been, any law in force in the State (or in any other State) either for or against inheritance by aliens. And there cannot be, except at the will and pleasure of foreign nations, for no nation need make any treaty on the subject unless it sees fit to do so. And it would not help the matter to say that the federal Courts could intervene. For if we assume that the federal Courts have any probate jurisdiction as such, i. e., aside from a "controversy" between parties, they have no power to make laws, but only to expound and apply them; and, upon the plaintiff in error's argument there would be no law to administer, and could not be without the consent of foreign nations.

But this is not the only absurdity which would result from the sanction of the contention of plaintiff in error. Anything relating to the rights of aliens may be the subject of a treaty.

Geffroy vs. Riggs, 133 U. S., 267.

Their lives and liberties are as much within the treaty making power as their property. Hence (according to the logic of plaintiffs position) all the State laws protecting them from murder, rapine and other violence, are "an invasion of the treaty making power" and void. No Court would have any jurisdiction to enforce such void laws, and all the State judgments in that regard would be without jurisdiction and mere "idle forms."

Upon the same principle the State laws as to marriage would not apply to aliens within their borders, either with other aliens, or with women of the State, and such marriages could not be recognized even as to property within the State. So the State law of wills would not apply to the wills of aliens

either resident or non-resident. So the State law of escheat would not apply to the property of aliens within the State. And the principle could not be confined to the individual rights of aliens. It would have to apply to their corporate rights as well. The result would be that the State laws would not apply to foreign corporations doing business in their territory.

The principle would have to be extended even further. Treaties are on the same footing as laws.

> Whitney vs. Robertson, 124 U. S., 190;
> The Chinese Exclusion Case, 130 U. S., 600;
> Horner vs. U. S., 143 U. S., 571;
> Fong Yue Ting vs. U. S., 149 U. S., 720-1.

So that if the treaty making power be so exclusive in its nature as, though unexercised, to nullify all State legislation upon subjects as to which a treaty might be made, it would follow that there would be similar results as to State legislation upon any and all subjects as to which a federal law might be enacted. It is hardly necessary to say that such is not the case. We have not thought it necessary to explore the authorities in relation to concurrent powers of the Federal and State Governments.

But we are not left to general reasoning. The very question which the plaintiff in error seeks to agitate has long ago been settled by the repeated decisions of this Court, as we now proceed to show.

In Chirac vs. Chirac (2 Wheaton, 259), it was held that alien heirs could inherit from a naturalized citizen of Maryland, because the statute of the State so provided, the Court, speaking through Chief Justice Marshall, saying: "This question depends on the laws of Maryland." The law of that State (like the law of California) provided that the alien heir should appear and claim the property within a fixed period. The Court said that this operated as a condition subsequent, but

that its performance was dispensed with by a later treaty. (Mem.: It is not averred here that the defendant in error did not appear and claim the property within the required period; and the contrary is to be inferred from the record).

In Spratt vs. Spratt (1 Peters, 343), one of the lots in controversy was adjudged to pass to an alien heir by virtue of a State statute. Chief Justice Marshall, delivering the opinion saying: "The title to the lots in controversy depends on the construction of an act of the State of Maryland." The case came before the Court a second time, and was again disposed of upon a consideration of the State statute, the Court saying: "Since aliens are incapable of taking by descent, the answer to this question depends on the 'enabling act of the State of Maryland in the year 1791.'"

Spratt vs. Spratt, 4 Peters, 393.

In Levy vs. M'Cartee (6 Peters, 102), the question was whether, in New York, a citizen could inherit collaterally from another citizen, when the former must make his pedigree through mediate alien ancestors. It was held that he could not. But this result was arrived at upon a consideration of the New York law. And Mr. Justice Story, delivering the opinion said: "The question is one of purely local law, and as such must be decided by this Court" (p. 109).

In Beard vs. Rowan (9 Peters, 317-18), one of the questions was whether one Allen Campbell, an alien, could take and hold land in the State of Kentucky, under an act of that State which extended the privilege to aliens who had resided in the State for two years. It was held that he could, and the Court, speaking through Mr. Justice Thompson, said:

> "That preamble evidently shows that the intention of the legislature was to make a general provision for removing the disability of aliens to hold real estate, and this, founded upon State policy, doubtless for the purpose of encouraging the settlement of the country. * * *

No constitutional objection can be made to this act. It does not profess to naturalize aliens. It is not necessary that they should be made citizens in order to hold and pass real estate; and the condition upon which this may be done, is a matter resting entirely with the State legislature."

In Mager vs. Grima (8 How., 490) the Court sustained a law of Louisiana imposing a tax on legacies to aliens, which did not apply to legacies to citizens or to aliens domiciled in the State. And Chief Justice Taney, delivering the opinion, said:

"Now, the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and term upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every state or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

The doctrine of the preceding case was approved and applied in Prevost vs. Greneaux (19 How., 7), and in Frederickson vs. Louisiana (23 How., 447).

In Airhart vs. Massieu (98 U. S., 491), the Court recognized and applied the principle that the property rights of aliens were controlled by the State law.

In Hauenstein vs. Lynham (100 U. S., 483), the right of the alien to inherit was sustained under the treaty with Switzerland. But the Court recognized the principle that in the ab-

sence of a treaty the State statutes would control, and speaking through Mr. Justice Swayne, said:

> "The law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. (Vattel, book 2, c. 8, Sect. 114). In our country this authority is primarily in the States where the property is situated" (p. 484).

In Griffith vs. Cody, 113 U. S., 96, the principle was applied to the Constitution of California in force at the period then under consideration.

In Hanrick vs. Patrick (119 U. S., 156), the principle that in the absence of a treaty the property rights of aliens depends upon the State laws was applied to Texas titles in an elaborate opinion by Mr. Justice Mathews.

The question, therefore, has been repeatedly decided by this Court against the view of plaintiff in error, and it would seem that if any question can be considered settled this ought to be so.

The doctrine is only a branch of a wider principle, which was stated by Mr. Justice Shiras in a recent case as follows:

> "It is a principle firmly established that to the law of the State in which the land is situated, we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances."
>
> De Vaughn vs. Hutchinson, 165 U. S., 570.

And such has always been the doctrine of the Court.

U. S. vs. Crosby, 7 Cranch, 115;
Clark vs. Graham, 6 Wheat., 577;
Kerr vs. Moon, 9 Wheat., 570;
McCormick vs. Sullivant, 10 Wheat., 202;
McGoon vs. Scales, 8 Wall., 23;
U. S. vs. Fox, 94 U. S., 320;
Brine vs. Insurance Co., 96 U. S., 627;
Robertson vs. Pickerell, 109 U. S., 610;
Ridings vs. Johnson, 128 U. S., 224;

Arndt vs. Griggs, 134 U. S., 316;
Cope vs. Cope, 137 U. S., 682;
Hutchinson Investment Co. vs. Caldwell, 152 U. S., 65;
Lynch vs. Murphy, 161 U. S., 247;
Budzisz vs. Illinois Steel Co., 170 U. S., 41;
Magoun vs. Ill. Trust Co., 170 U. S., 289.

From every point of view, therefore, the position that the provisions permitting aliens to inherit were beyond the power of the State to enact is destitute of every semblance of merit.

c. If the Code provisions permitting aliens to inherit, and in relation to the institution of heirship, were an invasion of the treaty making power, or even a violation of an actual treaty, the judgments of the State Courts would not be void or subject to attack in any way except on appeal or writ of error. It is plain that, so far at least as the State can confer, her Courts had complete jurisdiction of the proceedings which resulted in final decrees in favor of the defendant in error. We have already stated the position in this regard, and will briefly discuss the matter.

The Superior Courts are courts of general jurisdiction, having full power over all "matters of probate." Indeed, if we leave out the Court for the trial of impeachments, (the Senate), and Justice of the Peace, who have jurisdiction only of money demands under $300, the Superior Courts are the only courts of original jurisdiction in the State. In them is lodged, in the first instance, all the judicial authority in the State, whether in law or in equity, or of statutory creation. *There is no other class of State Courts which could possibly have jurisdiction of proceedings like those stated in the bill.* The Constitution expressly gives them jurisdiction "of all matters of probate," and that they "shall be courts of record" (Sec. 12, Art. VI). When sitting in probate they have all the powers, both at law and in equity, which are necessary to the exercise of their probate functions; and the most complete and ample machinery for the investigation of such matters is provided by statute, including

at least three formal methods of trying and determining the question of heirship, (each of which was resorted to in this case), with appeals to the Supreme Court in each proceeding.

With the exception of a few small counties, where there is one court for two counties, there is one Superior Court for each county, or city and county. The Superior Court of the City and County of San Francisco was, under the statute, the only Superior Court of the State which could take jurisdiction of the Estate of Thomas H. Blythe, because the complaint avers that at the time of his death he was a resident of said City and County, and left estate therein.

All the proceedings necessary to give the Superior Court of San Francisco jurisdiction of this particular estate, and of the three proceedings which resulted in the decrees in favor of the defendant in error, were taken. This appears to be so, not only because nothing is averred to the contrary, and therefore the presumption in favor of the action of Courts of general jurisdiction and the presumption against the pleader apply, but also because the complaint avers that the plaintiff in error appeared in each proceeding and joined issue thereon. No attempt was made to remove any of said proceedings to the Federal Courts, but they were allowed to pass to judgment in said Superior Court, and thereupon appeals were taken to the State Supreme Court, where the several decrees were affirmed. And this Court will take notice from its own records that thereafter a writ of error was sued out; that such writ of error was dismissed for want of jurisdiction, and that it appears from such writ of error that Boswell M. Blythe was a party to such action.

Blythe vs. Ayres, 167 U. S., 746.

The ultimate question decided by the State Courts was the right of the defendant in error to the property in suit as the heir of Thomas H. Blythe. This question was necessarily involved in the decrees of the Superior Court. For it cannot be disputed that the capacity of defendant in error to inherit

was necessarily involved in the decrees determining that she did inherit. Being necessarily involved, it would not matter whether the facts were actually litigated or not. In a subsequent suit in a State Court to quiet title to the property, the probate decrees were conclusive of everything which might have been litigated.

Cromwell vs. County of Sac., 94 U. S., 352;
Stout vs. Lye, 103 U. S., 66;
Life Ins. Co. vs. Bangs, 103 U. S., 782;
Dimmick vs. Revere Co., 117 U. S., 565-6;
Wilson vs. Deen, 121 U. S., 532-3.
Dowell vs. Applegate, 152 U. S., 327;
Morenhout vs. Higuerra, 32 Cal., 296;
Sullivan vs. Triunfo M. Co., 39 Cal., 459;
Byers vs. Neal, 43 Cal., 216;
Brummagin vs. Ambrose, 48 Cal., 368;
Parnell vs. Hahn, 61 Cal., 131.

In addition to this the complaint shows that the question was actually litigated, the question of the non-resident alienage of the defendant in error being "made plainly to appear."

In addition to the foregoing authorities cited, all of which plainly demonstrate that the contention of the plaintiff in error is frivolous, the precise question here attempted to be raised has been twice decided by this Court in this very matter. We have referred already to the case of Blythe vs Hinckley, 167 U. S., 746. That was a writ of error to the Supreme Court of California to review a decision of that Court affirming a decision of the Superior Court of the City and County of San Francisco distributing to defendant in error Florence the property of the Estate of Thomas H. Blythe. On that writ of error the same questions, raised on this writ of error were involved. But, this is not all. In the case of Blythe vs. Hinckley, 173 U. S., [illegible], the question was again involved. That was an action instituted in the Circuit Court of the United States for the Northern District of California to quiet title to the property of the estate of Thomas H. Blythe. The complainants there claimed to be the owners of the property. The

judgments of the State Courts were attacked upon exactly the same grounds urged in this case. The question as to the right of non-resident aliens to inherit was brought to the Court's attention, and also the finality of the decrees of the State Court.

We have followed, in large measure, the brief used in that case. The Court, speaking by Chief Justice Fuller, held,

> "The Superior Court of San Francisco was a Court of general jurisdiction, and authorized to take original jurisdiction 'of all matters of probate,' and the bill averred that Thomas H. Blythe died a resident of the City and County of San Francisco, and left an estate therein; and that Court repeatedly decreed that Florence was the heir of Thomas H. Blythe, and its decrees were repeatedly affirmed by the Supreme Court of the State. So far as the construction of the State statutes and State Constitution in this behalf by the State Courts was concerned, it was not the province of the Circuit Court to re-examine their conclusions. As to the question of the capacity of an alien to inherit, that was necessarily involved in the determination by the decrees that Florence did inherit; and that judgment covered the various objections in respect to Section 1978 of the Revised Statutes, and the tenth section of Article 1 of the Constitution of the United States, and any treaty relating to the subject.
>
> "We are not to be understood as intimating in the least degree that the provisions of the California Code amounted to an invasion of the treaty-making power, or were in conflict with the Constitution or laws of the United States, or any treaty with the United States, but it is enough for the present purpose that the State Courts had concurrent jurisdiction with the Circuit Courts of the United States to pass on the federal questions thus intimated; for the Constitution, laws and treaties of the United States are as much a part of the laws of every State as its own local laws and Constitution, and, if the State Courts erred in judgment, it was mere error, and not to be corrected through the medium of bills as those under consideration."

III.

ACCORDING TO THE LAWS OF THE STATE OF CALIFORNIA, THE DEFENDANT IN ERROR WAS ENTITLED TO INHERIT HER FATHER'S ESTATE, WHETHER SHE WERE AN ALIEN OR NOT.

Sections 671 and 672 of the Civil Code of the State of California, have been held by the Supreme Court of California to be valid and not in conflict with the Constitution of that State.

The Constitution of the State of California, Section 17, Article I, provides that:

> "Foreigners of the white race or of African descent, eligible to become citizens of the United States under the naturalization laws thereof, while *bona fide* residents of this State, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as native born citizens."

In respect to that provision of the Constitution and Section 671 of the Civil Code, it is said by Justice McKinstry, in State vs. Smith, 70 Cal., 153-155:

> "The Constitution (Art. 1, Sec. 17) prohibits the legislature from depriving resident foreigners of any of the rights enjoyed by native born citizens with respect to the acquisition, possession, enjoyment, transmission, or inheritance of property.
>
> "There is no provision of the Constitution which prohibits the legislature from conferring the same rights upon those born in foreign countries who have never been residents of this State.
>
> "Section 671 of the Civil Code provides: 'Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State.'
>
> "*It is suggested that inasmuch as laws can have no extra-territorial operation, the Legislature has no power to provide*

for succession by foreigners who have never been residents. But the section of the code provides a rule with respect to property within this State. It confers a right to be enjoyed within the jurisdiction." (A good answer to the assignment of errors by the plaintiff in error in this case.)

"Section 672 of the Civil Code reads: 'If a non-resident alien takes by succession he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in Title 8, Part 3, of the Code of Civil Procedure.'

"The words 'non-resident alien' are severely criticised by counsel for appellant. We find no difficulty in interpreting them as indicating those who are neither citizens of the United States nor residents of the State."

"All aliens take by succession (Civ. Code., Sec. 671).

"The failure of a non-resident alien to 'appear and claim' within five years after descent cast operates a bar of his right to assert any title in the property as against the State."

That was a suit brought by the Attorney-General of California, in the name of the State, to declare the estate of John Smith escheated, on the ground that his next of kin, to whom the estate had been distributed, were non-resident aliens at the time Smith died. The Court of California decided that they could take and hold the property.

In Estate of Billings, 65 Cal., 593, it was also decided that the provisions of Section 17, Article I of the Constitution do not inhibit legislation extending the right of inheritance to non-resident alien heirs, and that under the provision of the Codes, non-resident alien heirs are entitled to share in the estate of an intestate equally with heirs of the same degree residing in the State.

The right of an alien to inherit real and personal property in the State of California under Section 671 of the Civil Code,

was also sustained in Lyons vs. State of California, 67 Cal., 380.

The statute as originally enacted in California, April 19, 1856, (Statutes of 1856, 137) provided that:

> "Aliens shall hereafter inherit, and hold by inheritance real and personal estate, in as full a manner as though they were native born citizens of this or the United States."

In State of California vs. Rogers, Adm'r., Etc., 13 Cal., 160, decided in April, 1869, it was contended on behalf of the State that the above-mentioned clause of the Constitution is restrictive as well as enabling, and that its terms exclude any other rights or privileges to aliens than those given, but the Court say in the opinion:

> "We think this view erroneous. The Constitution is not a grant of power or an enabling Act to the Legislature. It is a limitation on the general powers of a Legislative character, and restrains only so far as the restriction appears, either by express terms or by necessary inference.
>
> "The object of this provision was to secure a certain protection to such resident aliens as might be in the State at the time of a descent, but this short sentence was not designed to comprehend all the law in respect to aliens. The Legislature could not, indeed, abridge this privilege, but it was not disabled from extending it or adding other privileges. It might as well be urged that because the Constitution provided that no law should be passed impairing the obligation of contracts, no legislative regulation could be had; or, because a homestead was exempted from forced sale, there could be no exemption of other property. The alien is secured by the Constitution in this one privilege, but he may be secured by the Legislature in as many more as it chooses to give, provided there is no conflict with any Constitutional restrictions upon its power; of which this provision is not one."

That was also a suit instituted by the Attorney-General on behalf of the State to have the property adjudged escheated to the State, because those who would otherwise be entitled were non-resident aliens.

At the time of the death of the parties whose estates were involved, in Farrel vs. Enright, 12 Cal., 450; Siemssen et al. vs. Bofer, 6 Cal., 250, the common law was in force. In the former case Enright died in April, 1850; in the latter the parties claimed as heirs of Henry Hyer, who died in 1853. The death of each party whose property was in controversy in these cases occurred previous to the Act passed April 19, 1856, entitled "An Act relative to escheated estates" (Statutes of 1856, page 157), and in the case of People vs. Rogers, 13 Cal., on page 165, it is said that the descent was cast prior to the Act of 1856, and that Act was not involved in the decision of Farrell vs. Enright.

In reference to the estate of Thomas H. Blythe, deceased, the Attorney-General of the State of California brought suit against Philip A. Roach, the administrator of said estate, for the purpose of escheating the property of said estate to the State of California, which case is reported in 76 Cal., Reports, 294, op. p. 295. In this case the Supreme Court of California recognized the right of alien heirs to inherit the estate of Blythe; and we submit that this decision is conclusive as against the plaintiff in error, as that decision became the law of the case, so far as that estate is concerned, and that as neither the plaintiff in error nor his ancestor appealed to this Court, by writ of error or otherwise, he must be deemed to be estopped by the State decision as to the question or right of foreign heirs to inherit.

The same propositions that are presented in this case by the plaintiff in error were urged by the same party and others before the Supreme Court of the United States, in the case of Blythe vs. Hinckley, mentioned in 167 U. S., 746, which case was taken to this Court under a writ of error to the Supreme

Court of California, In re Blythe, reported in 110 Cal., 229, and this Court summarily dismissed the writ of error, for want of jurisdiction, upon the ground that no Federal question was involved; and we think this decision, under the facts of this case, is decisive in favor of the defendant in error in the case at bar, and by that decision the plaintiff in error is forever barred and estopped from making any claim against her on account of said estate.

IV.

THE POWER OR THE RIGHT TO ADOPT A CHILD DEPENDS UPON THE LAW OF THE COUNTRY OF THE DOMICILE OF THE FATHER, IRRESPECTIVE AS TO THE PLACE OF BIRTH OR THE ORIGINAL CITIZENSHIP OF THE CHILD.

Thomas H. Blythe was a citizen of the United States, a citizen and resident of the State of California, and the authorities agree upon the proposition that an illegitimate child, wheresoever born or residing, possesses the capacity to be legitimated, according to the law of the country of the domicile of the father. Munro vs. Munro, 7 Clark and Finnely's Reports, 842; the case In re Wright's Trust, 2 Kay and Johnson's Reports, 607; Dicey on Domicile, pages 5, 6, 72, 97, 182 and 186; In re Don's Estate, 4 Drewry's Reports, 194; Bar's International Law, Section 102; Westlake's Private International Law, page 35; In re Grove-Vaucher vs. The Solicitor to the Treasurer, L. R. 40 Ch. Div., 216-232; and Schouler's Domestic Relations, Section 231; Blythe vs. Ayres, 96 Cal., 532.

Under paragraph I of this brief, we cited the case of Quimby vs. Boyd, 128 U. S., 488. In that case this Court held that

alleged errors of a State Court which involved questions either of fact or of state, and not federal law, are not reviewable in the United States Supreme Court on a writ of error. So we say here, in reference to the question whether the defendant in error was or was not adopted as the child or heir at law by the said Thomas H. Blythe, that involved a question of fact, and also involved the question whether or not Thomas H. Blythe exercised the acts and things necessary and requisite to be done under the laws of the State of California to constitute that adoption. Therefore, the fact of adoption is one which this Court cannot consider under the authority just cited, as this Court will not review the facts upon which the State courts founded their decision in the case where the defendant in error was declared to be the adopted child and heir at law of Thomas H. Blythe, prior to the commencement by the plaintiff in error of the suit at bar, and any question of that kind now raised by the plaintiff in error must of necessity, be nothing but a collateral attack on the judgment of the State Court which in no event should be entertained by this Court. This Court cannot question the decision of the State courts declaring that the defendant in error was adopted by Thomas H. Blythe. So long as that finding of fact stands this Court cannot grant plaintiff in error any relief whatsoever, whether there is a federal question involved or not.

V.

THE QUESTION OF KINSHIP OF PLAINTIFF IN ERROR TO THOMAS H. BLYTHE WAS INVOLVED AND DETERMINED IN BLYTHE VS. AYRES, 96 CAL. 532, DECIDED NOV. 30, 1892; AND IN THE CASE OF BLYTHE VS. AYRES 102, CAL. 254, DECIDED APRIL 24, 1894; THAT SUCH DECISION HAS BECOME FINAL AND OPERATES TO ESTOP PLAINTIFF IN THIS ACTION.

It appears from the record in the decision of the Superior Court in the proceeding under Section 1664 Code of Civil Procedure of California and in the judgment of the Supreme Court of the State of California, affirming the judgment of the lower court (Blythe vs. Ayres, 96 Cal., 532; Blythe vs. Ayres, 102 Cal., 254) and the application for distribution heretofore referred to (see pp. 8 to 39 hereof), that it was in both of said actions adjudged that the defendant in error was related to and was the sole heir of Thomas H. Blythe, and that James T. Blythe, father of plaintiff in error herein was not related to, nor was either of them related to said Thomas H. Blythe, deceased.

Therefore, the Court in both of said proceedings having determined that the defendant in error was the daughter and child and sole heir at law of said Thomas H. Blythe, and also adjudged that James T. Blythe, the father of the plaintiff in error, was not at all related to Thomas H. Blythe, the judgment against the plaintiff in error can be maintained upon the ground that neither he, nor his father James T. Blythe, were at all related to said Thomas H. Blythe, and consequently cannot be his heirs or inherit his estate, regardless of any other question. Had there been a federal ques-

tion involved that would not prevent the dismissal of the writ of error, and therefore, plaintiff in error cannot dispute the right of the defendant in error to Blythe's estate.

In Seneca Nation of Indians vs. Christy, 162 U. S., 283, where the decision of the state court was based, besides other grounds, upon the bar of the Statute of Limitations, it is said in the opinion, pages 289-290:

> "As it appears that the decision of the Court of Appeals was rested, in addition to other grounds, upon a distinct and independent ground, not involving any Federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well-settled rule on that subject and cannot be maintained. Eustis vs. Bolles, 150 U. S., 361; Gillis vs. Stinchfield, 159 U. S., 658."

It is also held by this Court in the case of State of California vs. Holladay, decided November 11, 1895, and reported December 2, 1895, in the opinions of the United States Supreme Court, No. 2, page 91, that the Supreme Court of the United States "will not review a State judgment unless a Federal question has been decided by that Court against the plaintiffs in error, nor even when a Federal question has been decided, if, also, another question not Federal was decided by the State Court which was broad enough to maintain its judgment.

It was also held by this Court in the case of the Rutland Railroad Co. vs. Central Vermont Railroad Co., 159 U. S., page 630, opinion bottom of page 640, that:

> "It is well settled, by a long series of decisions of this Court, that where the highest court of a state, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question. Murdock vs. Memphis, 20 Wall., 590; Jenkins vs. Lowen-

thal, 110 U. S., 222; Beaupre vs. Noyes, 138 U. S., 397; Walter A. Wood Co. vs. Skinner, 139 U. S., 293; Hammond vs. Johnston, 142 U. S., 73; Tyler vs. Cass Co., 142 U. S., 288; Deleware Co. vs. Reybold, 142 U. S., 636; Eustis vs. Bolles, 150 U. S., 361; in the last two of which many other cases to the same effect are cited."

This Court also held in the case of the Missouri Pacific Railroad Co. vs. Fitzgerald, 160 U. S., 566, opinion 576, as follows:

"We repeat what we said in California Powder Works vs. Davis, 151 U. S., 389-393, that 'It is axiomatic that, in order to give this Court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment rendered could not have been given without deciding it. And where the decision complained of rests on independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any Federal question that may also have been presented. Eustis vs. Bolles, 150 U. S., 361, and cases cited."

VI.

THE DECISION OF THE STATE COURT SOUGHT TO BE REVIEWED.

All of the questions raised by plaintiff in error in his assignment of errors were passed upon by the Supreme Court of California, in this case. We here quote in full that decision, and recommend it as containing an able exposition of the law on the subjects involved in this action:

"HENSHAW, J.—The purpose of this action was to recover from defendant certain land in the City and Coun-

ty of San Francisco. Plaintiff claims as an heir at law of Thomas H. Blythe, deceased. Without setting forth in detail the matters charged, it will be sufficient to say that the complaint pleads the proceedings and the judgments of the superior and supreme courts of this state, under which it was decreed that Thomas H. Blythe had instituted Florence Blythe, now Florence Blythe Hinckley, as heir, and the subsequent decree of the court distributing the property in question to her. The facts and the judgment to which reference has thus been made will be found at length in the action entitled Blythe vs. Ayres, 96 Cal., 532. It is contended by this bill that the judgments of the superior court and of this court so decreeing are absolutely void, and that plaintiff, as one of the heirs at law of Thomas H. Blythe, deceased, should have judgment to that effect. A general demurrer was sustained to this bill, and plaintiff, declining to amend, appeals from the judgment thereupon entered against him.

"In support of the complaint it is urged that Florence Blythe, at the time of descent cast, was an alien and British subject, who had never been within the jurisdiction of the United States or of the state of California, and that the state of California had and has, no power to extend to such non-resident aliens the right to inherit real estate within its territorial domain in the absence of a treaty provision to that effect between the United States and the country of such alien; that sections 230 and 1387 of the Civil Code, as applied to the case of such a non-resident alien, are without effect; that section 671 of the Civil Code is in violation of Section 10 of Article I of the Constitution of the United States, which declares that: 'No state shall enter into any treaty, alliance, or confederation,' and is in violation of Section 17 of Article I of the Constitution of the State of California, which (it is argued) limits the right of succession to the classes designated in the following language: 'Foreigners of the white race or of African descent eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of this State, shall have

the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as native-born citizens.'

"It has been affirmed and reaffirmed in the decisions of the Supreme Court of the United States that the question of the possession, enjoyment, and inheritance of property by resident or non-resident aliens is the proper subject matter of treaty. Thus, to employ but one quotation, in Geofroy vs. Riggs, 133 U. S., 258, it is said: 'That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation and of regulations by mutual stipulations between the two countries.' This principle was early recognized in this State in the case of People vs. Gerke, 5 Cal., 381.

"It need scarcely be said that at common law an alien was not of inheritable blood, and that disability attaches in this state, unless it has been removed by express law. By Section 671 of our Civil Code it is declared that: 'Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State.' Here is an express removal of the disability to which we have referred, and, if it be a valid law, it is determinative of appellant's contention. It is conceded that the treaties between Great Britain and this country are silent upon the subject. We are not then confronted with the case of a state law in declared conflict with the provision of a treaty, in which instance it is, of couse, uniformily held that the treaty is the paramount law. (Opel vs. Shoup, 100 Iowa, 407; Hauenstein vs. Lynham, 100 U. S., 483; Geofroy vs. Riggs, *supra;* Orr vs. Hodgdon, 4 Wheat., 453.) But by the appellant it is insisted that the very silence of our treaties with Great Britain upon the question is the equivalent of an express denial to its subjects of the right to inherit within our Republic, and that therefore a conflict arises and Section 671 becomes void as an illegal attempt to encroach upon the treaty making power of the

general government. But this view, we think, finds little favor either in principle or in authority. A state has the undoubted right to regulate the tenure and disposition of the real property within its boundaries, and such regulations always have been and should be held valid except where they conflict with the express provisions of a higher law. Thus in United States vs. Fox, 94 U. S., 315, it is said: 'The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established rule of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated.' See also, Hutchinson Inv. Co. vs. Caldwell, 152 U. S., 65; Mager vs. Grima, 8 How., 490; Beard vs. Rowan, 9 Pet., 301. And this right to regulate the tenure and disposition of real property within its boundaries is not only in the State, but it is primarily in the State (Hauenstein vs. Lynham, *supra*), and is subject only to such control as may be exercised by the general government within its treaty making power. Therefore, it will be found that the Supreme Court of the United States nowhere declares State laws upon the subject to be void as an invasion of the treaty making power, but uniformily upholds the laws when not in conflict with the express provision of a treaty. Such was the case in Hanrick vs. Patrick, 119 U. S., 156, where the question was of the right of an alien subject of Great Britain to inherit, and the Court held that the laws of Texas governing the rights of aliens to inherit property in that State were of controlling force. And even in those cases where there is a conflict between the provisions of the State law and those of the treaty, it is not held that the State laws are void as an unwarranted interference with or encroachment upon the powers of the Federal government. It is held merely that such laws, in so far as they conflict with the treaty provisions, are suspended or controlled during the life of treaty. Thus in Geofroy

vs. Riggs, *supra*, the question being as to the effect of the provisions of a treaty with France upon the laws of Maryland which were in operation in the District of Columbia, it is said: 'The treaty, being part of the supreme law of the land, controls the statute and common law of Maryland whenever it differs from them. * * * The treaty expired by its own limitation in eight years pursuant to an article inserted by the Senate. During its continuance citizens of France could take property in the District of Columbia by inheritance from citizens of the United States, but after its expiration that right was limited as provided by the statute and common law of Maryland."

"It is concluded, therefore, upon this proposition that the sections of our Civil Code which have been under consideration are not in conflict with the provisions of any treaty between the United States and Great Britain, and are not an invasion of the treaty making powers of the United States government.

"The argument that Section 671 is inoperative to cast descent upon defendant, for the reason that the laws of the State can have no extra-territorial force, seems to be fully answered by the language of this Court in State vs. Smith, 70 Cal., 153, where it is said, discussing this very section: 'It is suggested that, inasmuch as laws can have no extra-territorial operation, the Legislature has no power to provide for succession by foreigners who had never been residents, but the section of the code provides a rule with respect to property within the State. It confers a right to be enjoyed within the jurisdiction.'

"The further contention that Section 671 of the Civil Code is void because in conflict with Section 17 of Article I of the Constitution of the State of California rests for its support upon the argument that the language of the Constitution is a limitation upon the power of the Legislature. But to give it such an interpretation would be to do violence to fundamental rules of construction. By Section 17 foreigners of the indicated classes may not be deprived of the rights which the Constitution secures to them. But there is in this no withdrawal from the Legis-

lature of its general powers, nor any limitation upon its right to extend similar privileges to other foreigners or aliens. (State vs. Rogers, 13 Cal., 160).

"It follows from the foregoing that the order of Court sustaining defendant's demurrer was properly made, and the judgment appealed from is therefore affirmed."

Temple, J., and McFarland, J., concurred.

We respectfully submit that the proceeding under Section 1664, Code of Civil Procedure of the State of California, was conclusive and final as against the plaintiff in error and all parties concerned. We also submit that the question in this case has been fully settled by the Supreme Court of the State of California, as will fully appear from the following cases:

Blythe vs. Ayres, 96 Cal., 532-595;
Also the Blythe Estate, Blythe vs. Ayres, 102 Cal., 254, 264;
Also the Estate of Blythe; Henry T. Blythe et al., appellants, 110 Cal., 229-231, and other cases there cited;
Blythe vs. Hinckley, 127 Cal., 431;
Blythe vs. Hinckley, 167 U. S., 746; and
Blythe vs. Hinckley, 173 U. S., 501.

We respectfully submit that under the cases cited the question as to whether the defendant in error was entitled to inherit the property of Thomas H. Blythe, deceased, was a question involving real property within the State of California, to be governed entirely by California laws as construed by California courts, and affecting the property within the State of California, without reference to the residence of either or any of the claimants, and under the laws of California, without regard to their alienage or citizenship. The right of an alien to inherit in California is a question for the sovereign power of California to determine, which has been fully provided for

by the acts of the Legislature, and its highest court has determined that issue in favor of the defendant in error, and that judgment should stand.

There is no question or claim of a treaty between California and Great Britain. Such a controversy is not involved in this case, and any authorities which may be cited by counsel against the right of aliens to inherit are those where the common law is in force and not as it is in the State of California, where such law as to inheritance is not in force.

It is respectfully submitted that the motion to dismiss the writ of error should be sustained.

If, however, a Federal question was or is involved, and if this Court on the record has jurisdiction, then it is respectfully submitted that under the decisions of this Honorable Court in Micas vs. Williams, 104 U. S., 556; Swope vs. Leffingwell, 105 U. S., 3; The "S. C. Tryon," 105 U. S., 267; The Alaska, 130 U. S., 201, opn. 208; Chanue City vs. Trader, 132 U. S., 210, opn, 213, 214, the judgment of the State Court should be affirmed, because it is evident that the reasons assigned for the taking of the writ of error were and are frivolous, and that it was taken for delay only.

WILLIAM H. H. HART,

Attorney for Defendant in Error, for the purpose of these motions.

Robt Y. Hayne
of Counsel

PLAINTIFF'S BRIEF

29043

Supreme Court of the United States

No. 347 — OCTOBER TERM — 1900.

BOSWELL M. BLYTHE,
Plaintiff and Plaintiff in Error,

AGAINST

FLORENCE HINCKLEY,
Defendant in Error.

Brief of Plaintiff in Error Opposing Motion to Dismiss and Affirm.

NOTE—Plaintiff in error is dissatisfied with the part of the record which defendant in error has set out in the brief. Therefore we print almost the entire record, as an exhibit, and attach it to this brief, and we beg the Court to examine it.

INTRODUCTORY.

It is believed that the following questions arise on the record in this case, and that each of them is a federal question:—

1st.—Can a non-resident alien take by inheritance or descent real estate situate in California in the absence of a treaty provision enabling him so to do?

2d.—Is the regulation of the descent to a non-resident alien of real estate situate in California within the treaty-making power?

3d.—Has the State of California jurisdiction within the treaty-making field of power, in the absence of a treaty; and can the State enact laws within such field, by the operation of which the title to real estate situate in California is cast upon non-resident aliens by succession?

4th.—Do the adoption laws, bastard laws, or probate laws of California, *silent* on the subject of aliens, include or apply to non-resident and absent aliens, or are such laws limited to the geographical boundaries of the State and to citizens or denizens of such State?

5th.—Can California, judicially or otherwise, project the operation of its laws or the judgments of its courts beyond the boundaries of the State, and thereby clothe non-resident and absent aliens outside of said State and the Union with any rights of succession in said State whatsoever?

6th.—Can a judgment, or any number of judgments, of the court of California procured by any person not eligible to sue, and resting upon subjects not included within the statutes or laws of the State, and dependent solely upon an unconstitutional statute of the State, be successfully pleaded as *res adjudicata?*

7th.—Where a former writ of error brought to this Court a record, silent upon a certain federal question, and that writ was dismissed by this Court for lack of jurisdiction, is that dismissal *res adjudicata* of the federal question, when properly brought here in a second case, clearly presenting the federal question?

BRIEF.

Now comes the plaintiff in error and opposes the motion to dismiss, and opposes the motion to affirm.

He says the case involves a federal question.

The complaint itself sets out the federal question on its face.

The trial court, upon demurrer, decided that federal question against him, and decided nothing else.

He took an appeal to the Supreme Court of California, which court affirmed the judgment, and in doing so, expressly decided the federal question against him, and decided nothing else.

The suit drew in question the validity of a statute of California, on the ground that it is repugnant to the constitution of the United States. And the decision is in favor of its validity.

The gist of the present federal question is, that the Constitution forbids the States legislating upon the subject of inheritance of land by non-resident aliens; and that a State statute which has been construed to vest such rights in such an alien is void.

As to the motion to affirm: We say the present question has never, *absolutely never*, been decided by this court, either for or against our contention.

No case ever brought the question up here, excepting two late cases brought up by these present counsel in the course of this Blythe litigation.

But those two cases were both dismissed for want of jurisdiction; so the question here brought up was not decided.

The question we here seek to have decided is not frivolous, for it is one which reaches deep into the meaning of the federal constitution.

It is a question which this court never has decided, pro or con., in all its history.

It is a question which the State courts never have decided.

In all the wilderness of adverse judgments so fondly relied upon and reiterated by adverse counsel, this question never was decided or raised.

Therefore, we say there is not the faintest color of ground for the motion to dismiss, and accordingly, the motion to affirm ought not to be entertained.

This plaintiff in error, as plaintiff below, filed his complaint in the Superior Court of San Francisco, California, against this defendant in error.

The defendant demurred, and as a general demurrer the same was sustained.

Plaintiff declined to amend, and judgment final was given for defendant.

Plaintiff appealed from that judgment to the Supreme Court of California, which court affirmed the judgment.

Thereupon, plaintiff sued out the present writ of error to this court; and defendant, in advance of its call upon the calendar, makes the present motion to dismiss and affirm.

Our first business is to show the federal question.

After that we shall show that said federal question has never yet been ruled upon by this Court.

Next we shall show that the group of judgments, of which opposing counsel make so much in their brief, are a false quantity in this discussion, being, all of them, made entirely without deciding or attempting to decide the present federal question.

The original complaint in this case was drawn with the single object of presenting this federal question, and for relief, so there is no other question in the case. The complaint sets up the claim that a certain statute of California, known as Section 671 of the Civil Code, reading:—

"Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State,"—

so far as it applies to non-resident aliens taking and holding land by succession, is repugnant to the provisions of Section 10 of Article 1 of the Constitution of the United States, reading as follows:—

"No State shall enter into any treaty, alliance, or confederation. . . . No State shall, without the consent of Congress, . . . enter into any agreement with another State, or with a foreign power."

The Court, in its opinion in this case, expressly decided that said Code, Section 671, *did* enable defendant to inherit the land here in dispute; that without it she could not have inherited; and that it is not repugnant to the Constitution.

The reason why we say that statute is repugnant, is, that the constitutional provision in question not only forbids the States from making actual treaties, but prohibits them from exercising any function which lies within the domain of foreign relations, or within the limits of the treaty-power of the general government.

Now, one of the subjects often dealt with in treaties between the United States and foreign countries, is, the subject of the right of inheritance which may be extended to a greater or less extent to aliens. In treaties with some countries this right of succession, or inheritance, has been liberally granted, while in other treaties that right has been sparingly extended; and in others, not at all.

And there are many decisions of this Court distinctly stating that this power of extending to aliens rights of inheritance, is, properly, a matter to be regulated by treaty.

Next, it must be manifest, that such a matter as this is a part of the exclusive prerogative of that branch of our general government which deals with foreign relations, and more, its exercise is still further confined to the care of "the President, with the advice and consent of the Senate."

On the other hand, the little code section of California law, as it has been construed in this case, would brush aside all the exactions and restrictions which our treaties have imposed as to limiting rights of succession by aliens, and would confer on all aliens the world over, the fullest unrestricted right of succession in California, independent of treaties and in spite of treaties and of statutes passed by Congress. For, in the *Estate of Billings*, 65 Cal. 593, the Supreme Court of California long ago decided, that Section 671 meant to give aliens the right to take land by *descent*, as well as by purchase.

Our code section (as thus construed) then, certainly *does attempt* to exercise at least one of the treaty functions; it does attempt to deal with a matter which belongs to our national foreign relations department. It is *because* a State *must not* exercise treaty powers, and must not invade the domain of foreign relations, that this statute is void, in so far as it would operate to invest aliens with rights of succession.

Now, take an alien with whose country no treaty has been made granting to its subjects the right of succession in the United States, such as a British alien. Assume that alien remains always in England, a subject of the Queen, till after a person dies in California, leaving there an estate in land. We claim, that when such an alien, coming to the United States for the first time after descent cast, applies to a California court; and, after showing her alienage at the time of descent cast, claims the land as by succession only, under the Califor-

nia law, the Court has no jurisdiction even to hear her claim.

The statute, on which her claim to succession is based, is a void statute. Any judgment resting on it, is a void judgment.

If, in such alien's suit, some one should challenge the Court's jurisdiction to hear the alien's claim, and should attack the State statute as being repugnant to the Constitution, and the State court, ruling upon the federal question, should sustain the validity of the statute, then the final decision of the State court would be reviewable by this Court on writ of error; or, if the case be not brought up, the judgment of the State court might still be authority upon the merits of the federal question.

But, where *no one does* attack the constitutionality of the State statute, and *no one attacks* the jurisdiction of the Court to hear the alien's claim; where a judgment is given in favor of the alien, adjudging her the owner of the land by succession, upon a *mere construction* of the statute, without regard to its constitutionality, and where the decision of the State court is so remote from and regardless of the federal question that this Court dismisses a writ of error upon that ground, for lack of jurisdiction, then the judgment of the State court is not an authority upon the federal question.

And if an action is afterwards begun by one who claims to be the heir, in which the federal question is directly raised and the judgment attacked as void, those judgments so assailed are not authority upon the federal question. And if, in the decision of such later case, the State Supreme Court gives its decision clearly in favor of the validity of the State statute, and against the federal question, then the former State judgment, or judgments, claimed to be void, are not authority against

the federal question, when the last case is brought to this Court on writ of error.

What status has such an alien, who comes fresh from a foreign country and asks a State court to adjudge that the State law has vested her with title to land by succession?

In the first place, such an alien applicant has chosen the wrong tribunal.

The only proper officer to whom an alien in that condition can apply, asking to have her status here declared, is the national Secretary of State.

To him she may put the question, "Has California, by its statute, given me rights of succession, the same as if the United States had made a treaty with my Queen?" "Has California, by that statute, succeeded in accomplishing this treaty function?"

That question is distinctly a political question, and, as courts have no jurisdiction to determine political questions, the litigant has no right to bring it before the Court.

Again, what are the "*civil rights*" belonging to such an alien, who comes to our shores after descent cast? Her purpose of coming is to bring a suit in a State court and to ask that court to say whether the State has not successfully usurped the federal power of the treaty-making branch of the general government. Has an alien any right to do that?

What are the civil rights of an alien?

Broadly speaking, civil rights pertain only to citizens. Yet an alien, domiciled in this country, is entitled to the protection of its laws, for which he owes a temporary allegiance. And as a general rule, the right of an alien to acquire and hold land carries with it the right to maintain real actions concerning it.

Yet said general rule as quoted and repeated in the books is based upon a range of cases, no one of which conceded to an alien the right to maintain an action asking the courts of a State to declare that the laws of that State had cast upon him an inheritance.

If an alien *has acquired* land, he may sue to recover it. The acquisition being conceded, his right to sue for it exists.

And, more than that, if his claim to it be by *purchase*, he may perhaps ask the Court to declare upon the validity of his claim.

For the subject of *purchase* by aliens, is not a matter exclusively within the treaty-field.

But when the subject is *inheritance*, the alien, in the absence of treaty rights, cannot ask a court to declare that the State statute has accomplished the office of a treaty and has vested him with the succession.

For that is a political question.

This writ of error presents just such a case as we have outlined.

An alien minor child was in England, a British subject, at the moment of the descent cast, and came to this country afterwards for the first time.

She applied to the courts of California, asking to be declared the owner by succession of this land in California.

That claim of succession was based solely on the California statute, because no treaty gave British subjects the right to inherit in the United States.

Her suit was adverse to an American citizen, kin and heir to the one who had left the estate; and she made him a defendant.

The California Court had no jurisdiction to entertain the political question propounded by the alien. The alien had no civil right to bring such a suit; and the statute on which the suit was brought was void.

The Superior Court itself may have been one of general jurisdiction; but the infirmity lay in the want of power of the State itself, because the Constitution of the United States has said that no State shall do certain things.

Still the court went on to a consideration of the alien's claim and entertained the political question, and gave judgment for the alien.

That judgment, we say, was void.

And when on appeal the Supreme Court of the State affirmed said judgment, that affirmation was void.

And when the alien next filed her petition for distribution, and set out on its face all her own alien infirmities and disabilities, yet claimed distribution by reason of alleged succession, that claim, and that petition, were *coram non judice*, because of the same constitutional objection and inhibition.

And the court's decree of distribution to her, subsequently made, was void; and the State Supreme Court's affirmance thereof was void, for the same reason.

When we say the Court has no jurisdiction of this alien's suit, we do not mean to imply any infirmity in the Court's complexion.

We may assume that the Superior Court is one of general jurisdiction and plenary powers; it might be, if you please, vested with the highest judicial powers within the control of the State. Yet it would not have the jurisdiction to hear such a suit of such an alien. As a matter of fact, the powers of the Superior Court, when sitting in probate, are rather limited. Still we say that, only lest we be understood to concede too wide a jurisdiction. But we repeat, our objection does not rest on that subject, whether greater or less powers have been delegated to the Superior Court in probate. Our point is, that the *State* itself has not the right, and must

not invade or meddle with those things which are within the limits of the treaty power.

It is the power of the State which we deny. We do not stop to talk of the complexion of the powers delegated to her courts.

And so, as we say, the court has no power to entertain this alien's suit, and as the statute, presuming to trench upon the treaty power, is void, therefore, any judgment which the Court may make, which concedes to the alien any rights of succession under the void statute, is also void.

And every act thereafter and thereunder pretending to affirm or to enforce or uphold such void judgment, is also void.

So when this plaintiff in error, an American citizen, filed his complaint in the Superior Court of San Francisco, setting up his own title, and pleaded the void character of the two pretended judgments, showing that the State statute (under which alone she claimed to have inherited, and on which said judgments were based) was void, as being repugnant to the constitution, he thereby set up on the face of his complaint a federal question.

And when the Supreme Court of the State, affirming the judgment in this case, placed its decision on that federal question alone, deciding it against plaintiff's contention, it made a case plainly within the jurisdiction of this court on writ of error.

THIS CASE.

The specific facts of this case may be briefly stated as follows:—

This plaintiff in error, Boswell M. Blythe, as plaintiff, filed his verified complaint herein in the Superior Court of the City and County of San Francisco, State of Cali-

fornia, against Florence Hinckley, this defendant in error, as defendant.

In his complaint plaintiff alleged as follows:—

That the late Thomas H. Blythe, a citizen of the United States, residing in San Francisco, died April 4, 1883, intestate, being then the owner in fee of a certain parcel of land in San Francisco, particularly described, of the value of three millions of dollars and upwards.

That said Thomas H. Blythe was never married, and left no father, mother, wife, or legitimate child.

That James T. Blythe, a citizen of the United States, who was the father of plaintiff, was one of the next of kin living at the time of the death of said Thomas H. Blythe, and was one of his heirs at law, and as such did inherit the real estate of said Thomas H. Blythe.

That said James T. Blythe in his lifetime was, by inheritance as one of the heirs at law of Thomas H. Blythe, the owner in fee and seized of an undivided interest as tenant in common with his co-heirs of said real estate.

That said James T. Blythe has died since the death of Thomas H. Blythe, and plaintiff has succeeded to and is now the owner in fee of the undivided interest in said real estate which was vested in his father, being the parcel of land described. The complaint then declares that the defendant, Florence Hinckley, claims to be the owner in fee and seized of the whole of said land, which claim conflicts with the claim of plaintiff.

It then declares that the claim of said Florence grows out of the following facts and none other:—

That said Florence was born in England in 1873, the illegitimate child of a woman then named Julia Perry, who had then never been married, and who was a native of England, and who had then never been out of Eng-

and, and who was a native-born subject of Queen Victoria. And said Florence was then a native-born subject of Queen Victoria.

That both said Florence and her mother, continuously remained in England and were at all times alien to the United States until after the death of said Thomas H. Blythe, and descent of his real property cast upon plaintiff's father in 1883.

That said Florence, as such illegitimate alien child, had no inheritable blood in her veins when she was born, nor when said Thomas H. Blythe died, and she was therefore incapable of inheriting said land to the exclusion of plaintiff's father.

That in 1883, after the death of Thomas H. Blythe, and after title of said land had vested in the father of plaintiff, Florence was brought from her home in London for the first time to the United States and to San Francisco.

That said Florence was then an infant alien, and ineligible to become a naturalized citizen of the United States.

That she was then *filia nullia*, no man's heir, and incapable of succeeding to the ownership of said real property by inheritance from Thomas H. Blythe.

That there was not at the time of her birth, or at any time thereafter, any treaty in force between the United States and Great Britain by the terms of which said Florence or her mother could inherit land in California or in any other State in the Union.

That after she came to California, Florence set up a false claim to said real estate; falsely pretending that said Thomas H. Blythe, in his lifetime, in California, had adopted her under Section 230 of the Civil Code of California, and had instituted her as his heir under Section 1387 of said Code.

That there was not, during the life of said Blythe, any law in force in England by the force of which he could have adopted or legitimated said Florence, or made her his heir, or capable of inheriting his land in California; nor was there any law in force in England by the force of which he could have done any act in California to absolve said Florence from her allegiance to Queen Victoria, or changed her status from a British subject to a citizen of the United States, or infused inheritable blood into her veins; nor was there any such law in force in California.

And the complaint further alleges, that after Florence came to America in 1883, she, by her alien guardian, commenced a special proceeding in her name in the Superior Court of San Francisco, for the purpose of having said court declare her claim to the heirship of said Thomas H. Blythe, and that she was his sole hier at law, under sections 230 and 1387 of the Civil Code, and entitled to inherit his estate.

That said special proceeding was commenced by filing a petition in the matter of the estate of said Thomas H. Blythe, which was followed by a complaint, also in her name.

That in both said petition and complaint, the facts of her English birth, of her illegitimacy, of her foreign residence and alienage as a British subject, were suppressed in order to enable the Superior Court to take jurisdiction of her claim.

That said Florence was the sole petitioner in such special proceeding, and it was only by the evidence, that it was for the first time made to appear to the court—as the fact was—that said Florence was born out of wedlock, a British alien, in England; that said Blythe never saw her; that neither she nor her mother had ever been in

the United States until after said Blythe's death, and that they were all aliens at the time of his death.

And the complaint alleges, that when these things appeared to the court, showing so absolutely that Florence was an alien British subject at the time of the death of Thos H. Blythe, it was the duty of the court to dismiss her said claim and petition and complaint, in so far as the title and descent of said land was concerned, for want of jurisdiction to adjudge or decree that she was capable of taking said land by descent. That, nevertheless, the Superior Court assumed jurisdiction, and proceeded to hear her claim, and determined the matters in said petition and complaint, and adjudged that said Thomas H. Blythe, in his lifetime, had adopted said Florence as his daughter under Section 230 of the Civil Code, and had instituted her as his heir under Section 1387 of said code, notwithstanding the fact that said Blythe was never in England after her birth, and she was never in the United States until after his death.

And the complaint alleges that, although it was made to appear plainly to the Court that Florence was an alien-born illegitimate child, a British subject, always in England till after descent cast, and ineligible to become a citizen of the United States at the time her complaint was filed, yet the court in giving its decision in her favor confined that decision to three questions, viz:—

1. Whether she was Blythe's child?

2. Whether he had adopted and legitimated her under section 230 of the Civil Code?

3. Whether he had instituted her as his heir under section 1387 of said code?

All which questions, and no other, said court decided in favor of said Florence.

And the complaint then alleged that said decision did not determine the question of heirship, title or interest in said real estate of Thos. H. Blythe in California, for want of jurisdiction in said court to determine that said Florence was the heir to the real estate of said Blythe in California, or capable of inheriting the same in the absence of a treaty then in force between the United States and the Kingdom of Great Britain and Ireland, giving to said Florence the right to inherit said real estate.

Yet said court did, without power or jurisdiction, decree said Florence to be the owner of said real estate by succession.

That from said judgment an appeal was taken to the Supreme Court of California, when all the foregoing matters were made to appear on the record, showing that neither Superior nor Supreme Court had jurisdiction to decide the question. Nevertheless said Supreme Court affirmed the judgment in her favor, only on the ground that said Thos. H. Blythe had instituted said Florence as his heir under section 1387 of the Civil Code.

And the complaint expressly declares that, "neither "said Superior nor said Supreme Court decided or de- "termined the question whether sections 671 and 672 of "the Civil Code of California, as applied to the claim of "said Florence to take said real estate by descent, were "or were not in violation of Section 10, of Article I, of "the Constitution of the United States; nor whether "said Florence could take said real estate by descent, in "the absence of a treaty between the United States and "Great Britain, enabling her to take said real estate; "nor whether said courts were without jurisdiction to "adjudge said real estate to said Florence upon her claim "as the heir of said Thomas H. Blythe, in the absence "of a treaty enabling her to take said real estate "by succession; nor whether any statute passed by the

" State of California, purporting to enable a non-resident " illegitimate British alien, such as said Florence, to take " real estate by succession, is not in violation of and re- " pugnant to Section 10, of Article I, of the Constitution " of the United States."

And said complaint alleges that said decision of said Supreme Court is null and void for want of jurisdiction in said court to decide that said Blythe could, under said section 1387, or under any law of California, infuse inheritable blood into the veins of a non-resident illegitimate alien, who at all times during his life had her home, and her allegiance, and herself remaining in England until after descent cast, and that Florence, being an infant, could not consent thereto.

And the complaint makes special reference to the precise character of that decision of the Supreme Court, as it is found reported in 96 California Reports, at page 532, *et seq.*

And declares that said decision of said Supreme Court was absolutely null and void for want of jurisdiction in the court to make the same.

The complaint then alleges that after the foregoing proceedings had terminated in said decision aforesaid, said Florence began an original independent special proceeding, by filing her petition in the Superior Court, wherein the administration of the estate of said Thomas H. Blythe was then pending, praying to have distributed to her the whole of said estate.

That said petition was presented as being authorized by the California statute providing for the partial distribution of estates in course of administration in probate. And the complaint alleges, that said petition for distribution was based solely upon the record and judgment in the special proceeding (of *Blythe* v. *Ayres*)

hereinbefore referred to, and upon no other claim or right whatever.

And the complaint alleges that on the face of Florence's said petition itself, all those facts were made to appear which present the federal political question heretofore referred to, viz.:—

That Blythe died a citizen of the United States; that Florence was born in England in December, 1873, the illegitimate child of an unmarried woman; that Blythe was never in England at or after her birth, and she was never in the United States until after his death and descent cast; that she was born a subject of Queen Victoria, and always remained such until after the death of Blythe; and that there was no law in England by which she could have been adopted by or made the heir of Blythe.

And the complaint alleges, that said petition of Florence came on to be heard by the Court; and it was the plain duty of the Court to dismiss the same, in so far as the real estate of said Blythe was involved, without proceeding further, for want of jurisdiction to distribute to her any part of said real estate.

That at the hearing, said Florence offered in evidence the entire record in the proceedings first above referred to—as *Blythe* v. *Ayres*—against the objection of James T. Blythe.

That thereafter the Superior Court made its decree without jurisdiction so to do, distributing said real estate to said Florence, and caused possession thereof to be delivered to her.

That an appeal was taken to the Supreme Court of California by plaintiff's father, who had answered and opposed said petition (upon grounds not touching the federal question here involved).

That pending said appeal the father of plaintiff died, and this plaintiff succeeded to the interest of his father in said land.

And said complaint alleges that said Supreme Court never had any jurisdiction to affirm the decree of distribution to said Florence.

But that without any jurisdiction to do so, said court did make a decision purporting to affirm said illegal and void decree of said Superior Court, and thereafter sent its remittitur to said Superior Court, and thereafter, on December 4, 1895, the possession of said real estate was delivered by the court to said Florence pursuant to said illegal and void judgment and not otherwise, nor by any other right or claim thereto whatever. And that she is now so in possession, collecting rents, and appropriating the same to her own use.

And the complaint then alleges, that said Florence sets up and claims that she did in fact inherit said real estate from said Blythe by virtue of Section 671 of the Civil Code of California, reading, "Any person, whether citi-"zen or alien, may take, hold, and dispose of property, "real and personal, within this State."

And the complaint alleges, that said Section 671, was and is an attempt on the part of the Legislature of the State to invade and encroach upon the treaty-making power of the United States contrary to and in violation of Section 10 of Article I thereof. And that every pretended claim to said land set up by said Florence of a right to inherit, or hold said land under statutes of California, is groundless, and unfounded in fact or law.

The prayer of said complaint asked for general and special relief, and for a judgment, (as authorized by Section 738 of the Code of Civil Procedure of California), deciding that the said conflicting claim of said Florence

is illegal, unfounded, false, and without merit, and that as against her claim, plaintiff is the lawful owner of the land and entitled to possession, and that his title thereto be quieted.

Such was the complaint. The defendant below, Florence, only demurred to the complaint.

The demurrer—as a general demurrer, was sustained.

The trial court gave judgment for defendant and against plaintiff.

The words of the judgment were, "that the defendant have judgment against said plaintiff upon the merits of this action, and that judgment be entered accordingly."

In view of the fact that the demurrer admitted all the averments of the complaint to be true, the meaning of a judgment against plaintiff "on the merits," was substantially a judgment against the federal question raised by the complaint.

The plaintiff accordingly appealed from said judgment to the Supreme Court of California. That court affirmed the judgment appealed from.

The federal question as made in the bill is not obscured by any amendments or motions, or even answers.

The case, as the bill made it, went up clean to the Supreme Court, and that court made a decision squarely on the federal question and on nothing else.

No defense of bar or estoppel; no collateral facts were to be considered.

Nothing was ruled on but the bare federal question.

The opinion of the California Supreme Court has been reprinted in this brief as a part of the record in this case, which we attach hereto as an exhibit. From that opinion it will be seen that the court went right at the federal question and decided it.

They first stated our contention, showing the federal question clearly, and then declared:—

"It is concluded, therefore, upon this proposition that "the sections of our Civil Code which have been under "consideration are not in conflict with the provisions of "any treaty between the United States and Great "Britain, and are not an invasion of the treaty-making "power of the United States government."

This was a clear, full decision of the federal question, and nothing else.

The more closely it is studied, so much more does it appear to be exclusively confined to a discussion and decision of the federal question,—whether that section of the Federal Constitution does not prohibit the States from making such statutes as will permit aliens to inherit —as did the statutes here in question.

The court decided against us, and declared clearly that the statutes of California were *not* repugnant to the federal constitution.

The court did not decide anything else.

No question of bar, or estoppel, or other defence, or evasion, received the slightest attention from the Supreme Court of California.

The federal question alone was decided.

Therefore this case comes, if ever case did, clearly within the language of the judiciary act: "There was drawn in question the validity of a statute of the State, on the ground that it was repugnant to the Constitution of the United States, and the decision was in favor of its validity.

From that decision the plaintiff sued out his writ of error to this court.

We feel very certain, therefore, that this court has complete jurisdiction to entertain and decide the case.

It is now the duty of this Court to decide for itself, unhampered by the decision of the State court, whether

the California statute in question is, or is not, repugnant to the Constitution. We are here asking the Court to do so.

We assert, that during the entire history of this nation, no case ever came to this Court where the federal question was at the same time more clearly presented by the pleadings and more clearly and exclusively decided by the State court.

Wherefore we say, that a motion to dismiss for want of jurisdiction is absurd and should be denied.

In so far as the present motion is to affirm, we have this to say:—

This Court never yet has passed upon the question, whether the section of the Constitution, here relied on, does or does not prohibit the States from legislating upon the subject of inheritance by aliens.

We say, the Constitution prohibits every State from *granting* to aliens the right to inherit; and also, from *taking* from aliens such right.

We say, the Constitution takes that subject away from the States entirely.

That question never was decided by this Court. No word in any decision sheds the faintest light upon it.

It is an absolutely new question. True, the counsel representing this plaintiff have *tried* to get this Court to decide that question, twice before. But each time the cause was dismissed for supposed lack of jurisdiction. So this question *never has* been decided.

There are decisions of this Court and of the State courts that a treaty upon any given subject overcomes a State statute, and there are decisions to the effect that States have the inherent right to regulate the laws of inheritance. But none of those decisions had in mind the question whether the Constitution (Article 1, Sec-

tion 10) did not prohibit States from legislating upon the subject of non-resident aliens inheriting land.

Wherefore, we say, this Court, in all its decisions, has never decided, or even considered, the present federal question.

We understand the practice of this Court to be that it will consider a motion to affirm only and when "it is manifest that the writ was sued out for delay only," or that the question on which the jurisdiction depends is so frivolous as not to need further argument, and that it will consider a motion to affirm, "where there is color for the motion to dismiss."

The Federal question made in the pleadings, decided by the court, and now awaiting decision in this tribunal, is of such absolute and undeniable character, that there is no color at all for the motion to dismiss.

No one can charge that plaintiff sued out this writ only for delay — since the federal question in it is the one single question he has been insisting on ever since the complaint was put on file.

. He may as well be charged with seeking delay in filing his complaint as in suing out this writ of error, for he has always and steadily pressed on this one single federal question.

And since this Court has never yet expressed itself at all concerning the effect of this constitutional inhibition upon the several states, we need not fear lest our federal question be considered "so frivolous as not to need further argument."

The weakest point made by our adversaries, and yet the one most calculated to deceive this Court, is the oft-repeated claim that the several judgments against us have adjudged upon this matter, time and again, and even that this Court has decided the question finally against us.

That argument is false. The judgments are false quantities in this case.

The judgments were had in the suits brought by this defendant in error claiming inheritance under State statutes only—the extent and force of those statutes—not their constitutional repugnance, was investigated and determined.

Those judgments in the State courts were not authority against this federal question.

From one of them a writ of error was sued out to this Court. It was on motion of counsel for this defendant in error dismissed for want of jurisdiction; and the same eager counsel now seize upon that decision of this Court, and pretend that the dismissal for want of jurisdiction was a full investigation and adjudication upon the merits of the cause.

That is but a sample of many cases where adverse counsel have sought to twist and distort these judgments till they make them appear to have been judgments on the merits of this federal question.

The truth is, not one of them decides the question. No Court ever has decided it; never yet in the history of this country. All this talk about this federal question having been already decided is mere pretense and sham.

If there be virtue in our point that Florence's judgment in the State court was void for the reason stated, it matters not how many times or in what different terms that judgment may have been expressed and repeated.

A series of appeals in different phases of that litigation led the State court to express itself as many times. If one of those decisions was void, they all were. And because Florence's counsel managed to frustrate a writ of error and an appeal, on the ground that this Court was without jurisdiction, the same counsel now come

here and proclaim those things as having actually decided this very question. The decision of that same question by this Court was what they attempted to prevent, and they succeeded in so doing. It is therefore trifling with this Court for the same counsel to masquerade those dismissals as *res adjudicata* of the question in issue.

For all these reasons, therefore, we submit, that the present motion to dismiss or affirm is without merit and should be denied.

THE JUDGMENTS AGAINST US IN PRIOR BLYTHE CASES OUGHT NOT TO HAVE ANY WEIGHT IN THIS INVESTIGATION.

Those prior judgments which we have pleaded in the complaint were in cases where the sole struggle was on the construction of the State statute, not on its validity. Those judgments were in cases brought by the alien as the sole plaintiff.

If our federal question is well taken, those cases were *coram non judice*, and those judgments were void. Those judgments are the objects of our present attack. The question of their validity as against us, is the very issue here. So what pretense of right can counsel have, for asserting that those judgments shall bar us or impede us, before the question of their validity has been at all considered?

Opposing counsel, by every artifice and device which ingenuity could suggest, have thrust those judgments constantly before the eyes of this Court, pretending that they have decided the question here in issue.

A group of adverse judgments constitute as a general thing, a formidable argument. And when they are artfully presented, by designing counsel, and, in various ways held up as being distinct adjudications on the case

at issue, the Court is apt to lend a willing ear to the idea that they have foreclosed a further examination of the case.

It seldom happens that a series of judgments all become harmless by reason of an underlying constitutional infirmity. But such is the case here. And we protest, that we ought not to stand prejudiced in this Court's mind by any of these judgments, until after our federal question has been thoroughly examined and found not well taken. If those judgments were inhibited by law, then they are as no judgments.

If Section 671 of the Civil Code is not repugnant to the Constitution—if States *have* the right to legislate upon this subject of alien succession, then it will be time enough to marshal these judgments against us. If the reverse be true, the judgments are, as against this suit, mere waste paper, and adverse counsel are imposing upon the Court by constantly pressing forward the argument as to the conclusive adjudication of those judgments.

So far as the claim has been made by adverse counsel that the decisions of *this* Court dismissing two former Blythe cases for want of jurisdiction, one writ of error to the California Supreme Court, and one appeal from the Circuit Court of the United States, we reply that when this Court dismisses a cause for want of jurisdiction, it does not decide the merits. So, such dismissals are not decisions against us. This Court will not listen to such a false argument.

The merits of the federal question.

Before launching out into this matter we desire to protest against being compelled to do so upon this summary motion. We do not wish to submit this case on briefs.

We desire to argue the merits in open court.

There is great dignity and importance in the federal question involved, and we object to submitting the case in this necessarily hurried and half-prepared manner.

On this day January 3d, we have received a printed transcript of the record. Still we shall proceed to present, as fully as the time will allow, the merits of the federal question.

We start with the proposition that an alien at common law has no heritable blood. In case of descent, the law takes no notice of an alien heir. Aliens are not heirs. And, as was said by the Supreme Court of California in this case, that disability attaches in the United States "unless it has been removed by express law."

The question is, what is the proper authority in the United States to change that disability? What is the proper mode of extending to aliens the right to take land by succession?

The Supreme Court of California attempts to answer our question by quoting Section 671 of the Civil Code, and then says:—

"Here is an express removal of the disability to which "we have referred, and if it be a valid law it is deter- "minative of appellant's contention." (see opinion herein)

We, however, had objected that it is not a valid law; because the States are forbidden to attempt such "express removal" of that disability.

We claim that the treaty-making power of the general government a part of the "foreign relations" department, is the only proper agent to endow aliens with rights of succession. We shall point to over a score of treaties in which the right of succession in this country has been extended to subjects of the other contracting countries.

And we shall refer to a number of decisions of this Court declaring that subject to be properly one within the domain of the treaty-making power.

In Article IX of our treaty with Peru;

In Article I of our treaty with Austria, concluded in 1848;

In Article II of our treaty with the Grand Duchy of Hesse, concluded in 1868;

In Article II of our treaty with Saxony;

In Article II of our treaty with Wurttemberg;

In Article XII of our treaty with Ecuador;

In Article VII of our treaty with the Hanseatic Republics;

In Article V of our treaty with the Dominican Republic;

In Article XII of our treaty with Bolivia;

In Article II of our treaty, of 1881, with Servia;

In Article XII of our treaty with New Grenada;

And in Article II of our treaty with Bavaria;

In all these, and many more the treaty-making branch of our general government, in its wisdom, did deal with and regulate this matter of the right of aliens to inherit land; and in those treaties the United States extended that privilege to a limited degree, specially prescribed in each instance. And by each treaty the United States acquired for our citizens some reciprocal privilege.

In *Geofroy* v. *Riggs*, 133 U. S. 266, Justice Field laid it down as the law, that this matter is a fitting subject for treaty regulation.

And the same was said in the Head Money cases, 112 U. S. 598.

See also *Wunderle* v. *Wunderle*, 144 Ill. 534, and *People* v. *Gerke*, 5 Cal. 382.

Next we refer to Article I, Section 10, of the Federal Constitution, which provides:—

"No State shall enter into any treaty, alliance or con-
"federation. No State shall, without the consent of Con-
"gress, . . . enter into any agreement with another
"State, or with a foreign power."

That section forbids each one of the States from meddling with any of those subjects which are within the domain of the department of Foreign Relations of the general government, or within the control of its treaty-making power.

This subject having been withdrawn from the independent action of the States, we find that Congress has, itself, by inference extended certain privileges to resident aliens, thus:

Section 1977 of the Revised Statutes reads:—

"All persons within the jurisdiction of the United
"States shall have the same right in every State and
"Territory to make and enforce contracts, to sue, be
"parties, give evidence, and to the full and equal benefit
"of all laws and proceedings for the security of persons
"and property as is enjoyed by white citizens, . . ."

Under that section, any person, even an alien, while he is within this country, may sue; but that does not give the right of inheritance, even to a resident alien, nor the right to present a political question to a court for adjudication.

The next section, 1978, reads:—

"All citizens of the United States shall have the
"same right in every State and Territory as is enjoyed
"by white citizens thereof to *inherit*, purchase, lease,
"sell, hold and convey real and personal property."

The "*right* to inherit," then, is granted by that stat-

ute, only to *citizens* of the United States, and is, by implication, denied to aliens.

We quote this section to show that the right which a citizen of Georgia has to inherit his father's estate in California, comes from the federal law, and not from the State law.

We believe that even Congress itself has not the power to extend rights of inheritance to non-resident aliens.

The reason is, that such an act of Congress, to be valid, would need to have an extraterritorial effect, and reach into the heart of a foreign country, and there give heritable blood to the alien.

In the case *In re Ross*, 140 U. S., pp. 453-464, a citizen of the United States (Ross) was convicted of murder committed on board an American ship in the harbor of Yokohama. The conviction was had in the American Consular tribunal in Japan, according to the terms of the existing treaty between the countries. Ross claimed the right of trial by jury under the Constitution.

The answer made by this Court was, that he could not invoke the protection of the Constitution until brought within the actual territorial boundaries of the United States, and that a treaty alone, could reach him while within the confines of the foreign country.

And so we say if the Constitution could not reach him, even to protect him, while in the foreign country, an act of Congress could not reach an alien to fill him with heritable blood under the same conditions.

The reason that States must refrain from interfering with this matter of aliens' rights of inheritance is, that the Constitution says so.

In *Holmes* v. *Jennison*, 14 Peters, 569, Chief Justice Taney laid down the rule that any subject which pertains to the Foreign Relations branch of our government, is by

that clause of the Constitution, excluded from the action of the States.

That was a very learned decision, which we hope the Court will examine in this relation.

And in *People* v. *Curtis*, 50 N. Y. 326, the same doctrine was adhered to. And there is sound reason in the rule; for if each State may grant to or withhold from aliens rights of inheritance, the treaty rights granted to different countries respectively in that direction will be thrown into ridiculous confusion.

In the various treaties we have referred to, the government of the United States has extended to subjects of certain foreign powers the right to take property by inheritance in this country, but to a limited extent. The aliens were obliged to sell the property and remove the proceeds within a limited period, one year, two years, and three years, respectively.

Yet all these treaty limitations consummated at great national expense, and patient negotiation, are wiped out by one Code section of California law which invites all aliens from any country to come and take the property and settle and remain.

CONGRESS HAS THE POWER TO EXCLUDE ALIENS.

THE PRESIDENT HAS THE POWER TO REMOVE AN ALIEN, SUMMARILY.

And yet both the above powers are checked and destroyed if the respective States may invite aliens to come and take land by succession and keep it.

We shall not further argue the merits of this federal question. We have said enough to show that it is a grave matter, and is within the jurisdiction of this Court, and has never been decided. If further argument is needed it should be had upon the argument of the main case.

THIS COURT HAS NEVER YET DECIDED THIS FEDERAL QUESTION. THE DECISIONS CITED AS BEING TO THAT EFFECT ARE MISLEADING AND DO NOT APPLY.

In *Chirac* v. *Chirac*, 2 Wheaton, 259, no one raised the objection which we here make. That matter was not in the mind of the Court. Further, the statute in question was passed by Maryland before the adoption of the Constitution; and finally, the ruling factor of that case was the fact that the treaty with France superseded the Maryland statute.

The case of *Spratt* v. *Spratt*, 4 Peters, 408, did not call up this federal question at all. The language of Marshal, C. J., in reference to the statute of Maryland, was without the idea that any one denied the right of Maryland to make such a law; and no one did in that case.

The same thing is true regarding *Levy* v. *M'Cartee*, 6 Peters, 102; and *Beard* v. *Rowan*, 9 Peters, 317.

There are lots of cases where the judges have examined and construed statutes of various States on the subject of alien inheritance, and in various forms declared that the statute was the thing which must be looked to; but, as not one of those judges had in mind any question of repugnance between the statute and the constitution, it is idle to quote such expressions as decisive of this case, *where we do assail the power of the State to enact the statute.*

The case, *Hanrick* v. *Patrick*, 119 U. S. 156, contains an agreement of both sides that Texas did have the right to pass the statute in question. And if it had been otherwise, Texas passed the statute in question when it was an independent nation, and under the statute, rights had vested, as to certain lands belonging to Texas. When Texas came into the Union it was distinctly

agreed that the United States would not interfere with the lands belonging to Texas. Under such circumstances, it is a mistake to refer to *Hanrick* v. *Patrick* as adjudging that such a statute *passed by a State* is not repugnant to the Constitution.

The case of *U. S.* v. *Fox*, 94 U. S. 320, does not pretend to decide this question, either. In that decision Justice Field, in declaring the undoubted power of the State to regulate the rules of the descent of real property, followed it with the saving clause that, "the power of "the State in this respect follows from her sovereignty "within her limits, *as to all matters over which jurisdic-* "*diction has not been expressly or by implication trans-* "*ferred to the federal government.*"

That last is what we here claim to be the case.

We say again, distinctly and earnestly, that we have never yet found a decision of this court upon the question, whether the constitution does not prohibit State legislation on the subject of inheritance by aliens.

Nor do we deny the general rule, so often announced by many courts, that the States of this Union have the right to regulate the laws of succession of land within their own limits. As a general rule, that is true; but it has its exceptions. As, for example, suppose a California statute be enacted to the effect that the next of kin, when citizens residing in California, shall inherit land to the exclusion of kindred residing in other States, or that persons in certain sister States should inherit in preference to those residing in other States. Such legislation would be void, as a violation of Section 2 of Article 4 of the Federal Constituiion, and also a violation of Section 1978 of the Revised Statutes.

This example alone is a proof that there is one exception to the rule as to the State's power to regulate the rules of succession. The general rule yields to the

prohibitions of the Constitution. And if our point is well taken, another of the exceptions is, where aliens are concerned.

If the treaty-making power is the exclusive authority to fix the rights of aliens to inherit land, then that subject must be one withheld from the States; and that also must be, as we say, an exception to the general rule that States have the inherent right to regulate the rules of succession.

In the cases quoted from by adverse counsel, where the courts have announced the above rule, no question had ever been raised as to any possible constitutional prohibition. So it appears to us that those authorities are out of place in this discussion.

We do not question the fact that the Superior Court of San Francisco is a court of general jurisdiction or that it has authority to take cognizance of matters of probate. We do not deny that Blythe was a resident of San Francisco, and that the Superior Court there was entitled to administer on his estate, or to settle or distribute it in proper practice.

The lack of jurisdiction of which we speak, did not arise from any inherent defect in that Court.

It was a lack of jurisdiction which would have applied alike to any Court which might be created by any State in the Union.

No State could create any Court which would have had jurisdiction of the suit of Florence at that time.

If it is true that the power to extend to subjects of foreign countries the right to inherit land in this Union, is a matter within the exclusive control of the treaty-making power of the general government, then States have no right to meddle with that subject.

Under such conditions any alien (subject of a country to whose people that right has not been conceded) who

comes fresh into any State and applies to its courts, asking to be declared the owner of land by succession, is making a demand which no State court can entertain. If the demand is based on a statute of that State which purports to extend the right of succession to the alien, that statute is void, and the suit based on a void statute, cannot result in a valid judgment for such applicant.

Whether there is a statute so purporting or not, the suit is a demand on the part of the alien to have the Court declare that the State has exercised a function which only the treaty-making power of the Union could possibly have done.

It is no answer to show that the State court is a court of general jurisdiction. The Court may have centered in it all the judicial powers of the State and yet our objection would remain, because if the State itself cannot give to aliens the right of succession, the State cannot vest its courts with power to declare that the State has done so. And no court, of any State, no matter what its powers, can, by assuming to say so, cause the suit of such alien to work an effective violation of the federal Constitution.

POINTS MADE IN THE MOVING BRIEF.

The declaration of adverse counsel that (p. 44) "the Superior Court *three* times declared that Blythe had *instituted defendant as his heir*" is only an evasion of the question here at issue.

To be "*the heir*" of a person implies succession at his death.

The ordinary statutes of a State, which provide the mode whereby a man may institute an illegitimate child as his heir, are statutes intended to deal with matters within the State's jurisdiction.

If a State is forbidden by the Constitution from declaring that legitimate aliens may inherit, it must follow that illegitimate aliens cannot fare any better.

If the State lacks the power to permit alien brothers and sisters to take by succession, it cannot have greater powers to extend to illegitimates. It is all a question of heirship, or succession, after all.

In the one case, the lawful kin would inherit but for his alienage.

In the other, the illegitimate—possibly no kin at all—would not inherit anyhow, and has the added defect of alienage.

The State has made a statute to the effect, that every illegitimate child is the heir of the person who, by a writing subscribed in the presence of a competent witness, declares himself its father.

Assume a man does so declare concerning the *alien* illegitimate. If it had been concerning a citizen resident of the State the act might remove the bar to succession, but when it applies to an alien in a foreign land, the trouble is not whether the statute has been complied with, but that the statute itself cannot accomplish the result of succession because the State itself has not that power. If the State itself, with all its sovereignty, is forbidden to confer the right of succession on aliens—even legitimate kin, is it not absurd to claim that an individual man, standing within that State, can, by merely signing a paper, according to a formula of the statute of that State, give to an illegitimate alien, while in its own country, full powers of succession?

The courts of California did decide in favor of defendant, and did declare her to have been instituted as the heir of Blythe while she was in England simply because the terms of the California statute were complied with.

The long array of decisions, printed by counsel, will melt away if this Court will but examine and see that never in any one of them was the present question of the prohibition of the Constitution considered.

When the first of the Blythe cases came up before the State Supreme Court much argument was had upon the question whether California's law as to institution of heirship of illegitimate children had any extraterritorial effect, or sufficiently so to reach a child domiciled in England. But that question was not the question involved here.

The question whether State laws have any extraterritorial effect is a matter very different from the question, whether the State law is not absolutely void as repugnant to the constitution.

On said former Blythe appeals the point was that, because Florence was domiciled with her mother in England at the time Blythe wrote certain letters in San Francisco, the writing of such letters could not make the California law reach over into England, to change the status of a child there, from illegitimate to legitimate. The court held against us. But that was a consideration of the *reaching* power of the State statute, without questioning its validity, or the power of the State to make such a statute, in the light of the constitutional prohibition.

When the California Supreme Court held that the status of the English child in England *was* changed by virtue of the act done, or letters written in California under the California statute, they merely gave extensive effect to a statute, the validity of which had not been attacked in that suit.

It is manifestly unfair to us and to the court for counsel to declare that thereby the California court had ruled against our *present* federal question.

But counsel opposed seems determined to convince the court "that this precise question was before the State court and actually passed upon," in the face of the fact that the California court never said one word upon the subject of the federal question here involved until it decided this present case.

Counsel quotes (p. 45) with satisfaction the decision in *Blythe* v. *Ayres*, 96 Cal. p. 558, where the California court went into the question, whether the California statute on institution of heirship of illegitimate children, had this extraterritorial force.

In that decision the California Supreme Court, when considering the extra-territorial reaching power of the California statute providing for the legitimation of children, used the following extravagant language (at page 563):—

"This section takes a wide range; its operation is not "confined within State lines; it is as general as language "can make it; oceans furnish no obstruction to its wise "and beneficent provisions; it is manna to the bastards "of the world."

The Court decided that case in favor of Florence merely because the California statute had this marvelous quality of penetration into foreign realms, which defied all the laws of nations to restrain it.

But we shall still venture to say that California has *not* the capacity to furnish manna to the bastards of the world. National lines and State lines still measure the extent of laws. And, in any event, the decision by the California court in that case, as to the wondrous far-reaching quality of the State law in favor of bastards, had no shadow of relation to the present federal question, as to whether the statute is repugnant to the Constitution.

From that decision it is plain that the question considered was the *effect* of a *valid* statute; not, whether the statute of California was not *void*, as purporting to invade the treaty-making powers of the general government, and as forbidden by the constitution.

AS TO THE CONSTRUCTION AND MEANING OF THE STATE CONSTITUTION.

We do not intend on this writ of error to discuss the question, whether the California statute is in conflict with the State constitution.

If our federal question is well taken, that itself will imply that any expression in the California constitution as to inheritance by aliens is equally void; so it becomes merely a result of the controlling federal question.

On pages 48–9 of the moving brief, counsel makes a show of meeting the real question of this case, declaring that we refer to no treaty, and that it is ludicrous for us to say that the code provisions constitute a treaty.

In reply, we say *we do not* claim that the code provisions constitute a treaty.

But we *do* claim that the code section, as construed, *assumes* to operate in the treaty field. The entire case of defendant in error hangs upon the validity of Section 671 of the Civil Code. It is our opponents who claim, from that code section, just such result as it is the exclusive office of a treaty to accomplish.

There can be no doubt that the subject (of extending to aliens the right to take land in this country) is the proper and usual office of a treaty,

The United States has done that in many treaties with many countries.

It is a subject entirely within the domain of foreign relations. The United States has not extended that right to British subjects.

To be more exact, a treaty has lately been approved by the Senate, but as yet unproclaimed, in which that result is aimed at, but no such thing existed at the time of the death of Blythe.

Therefore we say, if the California Statute does extend to all aliens the very rights which each separate treaty might accomplish, the statute certainly assumes to exercise the office and operation of a treaty, while it is not a treaty in fact.

The California statute invades the department and functions of the foreign relations of the general government.

The truth of our contention leads to no absurd or even embarrassing results. For, while the matter of inheritance or succession by aliens is the subject exclusively of the treaty-making power, the subject of *purchase* by aliens is not.

The subject of marriage by or with aliens is not.

We do say (adopting the language of the moving brief, p. 50) "that there is not, and never has been, any law in force in this State (or in any other State) either for or against inheritance by aliens." That is, no *valid law*. Many laws there have been on the subject and their validity has never before now been examined in the light of the present contention.

But it does not follow from the truth of our objection that the laws of marriage will be affected. Marriage is not a subject of treaty. On the contrary, the great broad rule extending over all the countries of Christendom is that a marriage good in one place is good in another, and that is in no wise repugnant to the Constitution.

Nor is there any truth in the deduction of counsel that if we are correct and "the treaty-power is so exclusive as to nullify all State legislation, . . . it

would follow that there would be similar results as to State legislation upon all other subjects as to which a federal law might be enacted."

That is not true, and it is a non-sequitur.

The constitutional inhibition which keeps States out of the treaty field does not exclude States from all the ground which might be covered by federal laws.

On the contrary, many are the subjects on which both State and federal governments have co-ordinate powers of legislation.

On page 51 of the brief, counsel says that the very subject which we seek to agitate has long been settled by the repeated decisions of this Court. That is not so. The decisions cited show the contrary.

On page 55 of the moving brief, it is said:—

"If the code provisions permitting aliens to inherit, " etc., *were* an invasion of the treaty-making power, the " judgments of the State courts would not be void or sub- " ject to attack except on appeal."

We reply, that a judgment based on a void statute is void.

A decree of a State Court on or in execution of a statute that is void, is itself void.

Ex parte Siebold, 100 U. S. 376;
Ex parte Yarborough, 110 U. S. 651;
Reddy v. *Tinkum*, 60 Cal. 459.

An alien British subject, coming fresh to this country, has not the *civil right* to apply to a State court and ask such court to declare that the California statute has, by exercising the office of a treaty, vested a title by succession in such alien, to the exclusion of American kindred.

We say that the condition of such alien coming to this country after descent cast, presents a question which should be determined by the United States Secretary of State. It is a political question. The Secretary of State will instruct the alien as to his rights; but that alien has no right to knock at the doors of the State court and demand of that court that it declare him or her to have been vested with heritable blood by a State statute. And so, we say, the court had no jurisdiction and its jugdments were void.

What is the purpose of adverse counsel in urging that the Superior Courts of California are courts of general jurisdiction?

No one disputes that. We admit that, with slight exceptions, all the judicial authority of the State is lodged in the Superior Court. But the State itself had not the right, and could not give to any court the right, to declare that such a statute as this operated effectively in the treaty field. The most ample machinery and the widest jurisdiction which any State could give to any court would not extend to that.

It matters not *how many* methods for determining the question of heirship the State may have provided, or this defendant may have resorted to; for they involved the fatal element of asking a State court, under a void statute, to declare that the State has encroached upon the treaty field; any court attempting to give judgment that way does a void act.

What does it avail defendant that she followed all the steps prescribed by the State statute for probate proceedings?

As to her, and her petition, the court was without any jurisdiction to act at all. She may have threaded every probate path, but that did not give validity to the statute in her case; did not give jurisdiction to the court; did

not permit the State to occupy the treaty ground; and, did not give any life to any judgment which any of the State courts may have given in her favor.

Counsel says (p. 56), that "all the proceedings necessary to give the Superior Court *jurisdiction of this particular estate* were taken."

To which we reply that the jurisdiction of the court to administer this estate may be conceded; yet that court had not the jurisdiction to adjudge that an English alien had inherited said estate under the California statutes of succession.

We do not deny the jurisdiction of the Superior Court over this estate. But we do deny its jurisdiction to take cognizance of the petition or complaint of this alien claiming said estate by succession under California statute. No court can have more power than its creator, the State, can give it. The State was impotent to confer that power.

Counsel says (p. 56), that because no attempt was made to remove Florence's case to the Federal courts, that was a concession of the Superior Court's jurisdiction. That is an absurd proposition. The federal courts would have had no jurisdiction of her case either.

It was not a case for removal.

Here was an alien who claimed title to land purely by succession. If there had been a treaty giving her those rights, her case would have been a proper one for the State courts.

Her demand was that the California court adjudge that the California statute had accomplished the office of a treaty.

The California law, in that regard, was void.

The California court had no right to entertain the political question presented.

The Federal courts had no right to either.

Her claim did not arise under any treaty or statute of the United States.

She was not an alien *defendant.*

It was not a case for removal.

Adverse counsel says (pp. 56–7):

"The ultimate question decided by the State courts "was the right of the defendant in error to the prop- "erty in suit as the *heir* of Thomas H. Blythe. This "question was necessarily involved in the decrees of the "Superior Court. For it cannot be disputed that the "capacity of defendant in error to inherit was neces- "sarily involved in the decrees determining that she "did inherit."

That language is calculated to mislead the Court. Throughout all the proceedings leading to the decrees in question, not one word can be found which points to the present federal question.

When those decrees adjudged "that she did inherit," they construed supposedly valid statutes; and "her capacity to inherit" was adjudged, *provided the statutes were valid.* Upon that assumption alone rested all the decrees pronounced in her favor.

The objection which was made concerning the status of this defendant and her foreign domicile, in said prior suits, was only that the California statute could not reach her in England, having no such extraterritorial force. Nobody in those proceedings challenged the power of the State to extend rights of succession to aliens.

The objection, that the force of a statute does not reach outside of California and into England, is far different from the present protest against the *validity* of the statute as in conflict with the Federal Constitution.

What is the consequence of the fact that the federal question was not raised or considered in those former Blythe proceedings?

The failure of a defendant in those proceedings to raise the question, did not supply the court with jurisdiction to entertain the alien's claim, nor to decide the political question.

The failure to raise that question did not make the void statute valid, nor cure its repugnance to the Constitution; did not make valid a void judgment, nor did that failure to object, enlarge the power of the State to operate within the treaty field, by statute, by judgment, or at all.

The very first time the present federal question found expression in the Blythe litigation, (or in any suit which ever came to this court, so far as we can find,) was in the assignments of error filed in the Supreme Court of California, when a writ of error had been granted to bring here the decree of distribution, by which the land in question had been distributed to said Florence.

The decision on that appeal, found in 110 Cal. Reps., p. 229, contains no reference to the federal question.

Hence, the decrees of the State court, as to the capacity of Florence to inherit, have nothing to do with the determination of the federal question underlying this cause.

Adverse counsel tells you (page 56) that said writ of error was dismissed for want of jurisdiction. He refers to 167 U. S. 746, and hastens to array that disposition of that writ of error as being another decision and final binding adjudication against the present federal question. We reply that it is absurd to array a judgment of dismissal *for lack* of jurisdiction as being a conclusive adjudication upon the merits of the case dismissed.

Next, as our bill says nothing about these dismissals made by this Court for want of jurisdiction, they are not in the case and ought not to be considered.

Again, it must be remembered that this case comes up on demurrer. All the facts stated in the complaint must be taken as true. There is no defense of bar or estoppel by judgment.

The complaint herein contains an express allegation (quoted in this brief) that neither the Superior nor Supreme Court of California decided this federal question.

The record, and the decisions themselves, show that to be a fact.

That allegation of fact certainly is well pleaded.

And the *demurrer herein admits that fact to be true.*

Now inasmuch as the State court did not decide this question at all, and as this Court, on writ of error, dismissed it for want of jurisdiction, we submit that our opponents cannot find in the dismissal any authority as to the present federal question.

Next, adverse counsel (p. 57) says that because in this case we declare that in Florence's application for distribution it was "made plainly to appear" that she was a British alien, therefore this federal question was actually litigated therein. To which we reply, the fact of her said alienage appearing plainly on the face of her petition for distribution, removed *her case* beyond the jurisdiction of the Court to entertain. The Court did entertain it. Nothing was said about the constitutional inhibition. The Court affirmed the decree of distribution but had no power or jurisdiction so to do and did not adjudge upon the question here in issue.

The present claim of adverse counsel that this federal question was *actually litigated* in the courts of California on the petition for distribution can find no sharper contradiction than his own assertion, made to this Court, when that very case was here on writ or error, and when this same adverse counsel, in his brief on motion to

dismiss for want of jurisdiction, on page 25 thereof, used the following language:—

[See case No. 804, October Term, 1896; file number 16,583; brief supporting motion to dismiss, p. 25.]

"If it were a federal question whether a State could "give non-resident aliens the right to inherit land within "the State, no such question was raised in any form in the "proceeding on distribution sought to be here reviewed."

That writ was dismissed for want of jurisdiction, which amounted to a decision by this court, as had been suggested by adverse counsel, that the State court in that case had not decided this federal question.

The same counsel would now like to have that case considered as an adjudication directly on the federal question, so, on page 57 of the moving brief herein he says that said case did decide the whole thing.

On page 57 of his brief, counsel opposed, again refers to the two dismissals of this court for want of jurisdiction in this Blythe litigation, reported in 167 U. S. 746, and 173 U. S. 497, and he says, "the precise question here at-"tempted to be raised has been twice decided by this "court in this very matter." (Brief, p. 57.)

We have already shown that those dismissals did not decide anything.

But, this repeated reference to them as being authority herein, and the persistent assertions of counsel that they have decided the merits of this cause against us, open the door for us, and authorize us, now and here, to call this court's particular attention to the records in those two cases, which disclose a very strange condition of affairs.

The case, the dismissal of which is found reported in 167 U. S. 746, was a writ of error to the Supreme Court

of California, after that court had affirmed the decree of distribution whereby this land, worth three millions of dollars, was distributed to this defendant in error. It was case No. 804 on the October term, 1896.

It was met by a motion to dismiss for want of jurisdiction. The motion was granted.

We ask leave, with greatest respect, to show by the original of said record,—

1st. That this court's action in granting the motion to dismiss was taken under a grave misapprehension of fact, because the record on which the court acted was a false record, which had been presented to this court on behalf of defendant in error, with an application for leave to print it for the purpose of the motion, and was not the true record;

2d. That the true record on that writ, which was filed in due time by plaintiffs in error therein, was not printed; and was not, so far as we are advised, ever brought to the attention of this court;

3d. That the assignment of errors, which was in the true record, was not in the false record.

So, that, instead of that dismissal being an authority against us in this case, we think that the true record in that case ought yet to be printed, and the case brought to the attention of this court in the shape which was given to it by the assignment of errors.

We shall here take the liberty of calling the court's attention to the manner in which its rules of practice were violated and its process abused on the motion to dismiss in that case; for, it resulted not only in an imposition upon the court, but it led the court to pass upon the motion in the light of a false record, and it leaves the true record yet to be considered in that case. And,

more than that, it shows how the rights of plaintiff in error may be imposed upon by the hurried presentation of such a motion, without any opportunity for oral argument.

That case was entitled Henry T. Blythe et al., *plaintiffs in error*, vs. Florence B. Hinckley—case No. 16,583, being No. 804 on the October term of 1896.

These are the facts.

A writ of error was granted by Mr. Justice Field in Washington, and the same was issued by the Clerk of the Supreme Court of the United States on March 24, 1897.

The writ ran to the Justices of the Supreme Court of California, and commanded them to have the record in the Supreme Court at Washington within sixty (60) days from its date, which would be by May 23d next thereafter.

That writ of error was sent by mail from Washington addressed to Mr. Jefferson Chandler in San Francisco, he being associated as counsel for plaintiff in error; was received in San Francisco and turned over to the attorney for plaintiff in error, pending the proper time to file it with the Clerk of the Supreme Court of California, in his office in San Francisco.

On April 9, 1897, *before* said writ had been filed with said Clerk of the Supreme Court of California, the attorney for defendant in error therein, in San Francisco, served upon the attorneys for plaintiffs in error a notice (of motion) that on May 10th thereafter, defendant in error would move to dismiss or affirm; and such notice was accompanied by a printed argument.

On April 30, 1897, plaintiffs in error filed said writ of error in the office of said Clerk of the Supreme Court of the State of California; together with the assignment of errors and such other proper papers as the rules and statutes require a plaintiff in error to file in order to make a complete record.

Thereupon the Clerk of said Supreme Court of California immediately made up said record, in obedience to said writ, and certified the same, and the same was forthwith duly returned and sent by mail to the Clerk of the Supreme Court of the United States in Washington; and plaintiffs in error sent forthwith to said Clerk $25.00 as docket fee therefor. And on May 8, 1897, the said Clerk in Washington wrote to Chandler & Holladay, attorneys for plaintiffs in error in San Francisco, that he had received the $25.00, and that "the transcript had come to hand."

So that the said cause and the true record thereof was duly filed and docketed in the Supreme Court of the United States, and was No. 804 on October Term of 1896.

But, before said true record could reach said Clerk in Washington, in fact, on the day when said writ of error was filed in the Supreme Court of California and before the Clerk of said Court could have made any return in obedience thereto, to wit, April 30, 1897, W. H. H. Hart, the attorney for the defendant in error, named in said writ, and Mr. F. D. McKenney of counsel, appeared before the Supreme Court in Washington and, making some representations, the details of which we do not know, made an application to the Court that a certain transcript presented by him (which he must have represented as being the true record in said cause) be printed and submitted with the motion to dismiss noticed for May 10th.

And the Clerk of said Supreme Court, Hon. Jas H. McKenney, on April 30, 1897, telegraphed in Washington to counsel for plaintiffs in error in San Francisco, as follows: "In Blythe case on application made to Court to-day by General Hart, Court directed transcript presented by defendant in error to be printed and submitted with motion to dismiss noticed for May tenth."

The fact is, that having served notice of motion (to dismiss) on April 9th, before any writ of error was filed in the Clerk's office in California, counsel for defendant in error were in a very great hurry, and without waiting until the writ and assignment of errors were filed, they proceeded in advance of those steps, and before April 30th, to wit: on April 23d, they caused the Clerk of the Supreme Court of California to furnish them with certified copies of the transcript on appeal in that court, of the opinion and judgment of that court and of the remittitur issued by that court to the Superior Court below—all of which said Clerk did furnish them with. But he did not furnish them with the writ of error or citation or assignment of errors, or with any copy of any one of said papers, since said papers nor any of them were not on file or with the Clerk of the Supreme Court of California at that time, on or about April 23, 1897.

And we say, that when counsel for defendant in error did appear before the Supreme Court of the United States on April 30, 1897, and did present an alleged transcript of the record in said cause, and did ask leave to have the same printed for the purpose of said motion, that said record was not the true record on said writ of error, because it lacked the writ of error, the citation, and particularly the assignment of errors, and it was a false and pretended record, and the court was deceived in the idea that it was the true record.

No act or thing done by counsel for the plaintiffs in error could have justified or excused the action of Mr. Hart in causing said false record to be printed. For, counsel representing the plaintiffs in error, having received said writ of error by mail, and the return day not being until May 23, 1897, felt that they were entitled, and that it was their duty, to hold said writ until their assignments of error with other papers were properly prepared, inasmuch as the statute commanded that the assignments of error be filed with and returned with the writ; wherefore, their failure to file said writ for a reasonable time was not an act of which the other side could take any advantage.

And the fact is, that the attorneys for the plaintiffs in error did file said writ of error and their assignment of errors, and the citation with the Clerk of the Supreme Court of the State of California in San Francisco, on the 30th day of April, 1897—on the very same day on which Mr. Hart appeared before this court in Washington and asked leave to print the false record.

And the true record, with the writ of error and the assignment of errors and citation and bond, all went up, being promptly returned by the Clerk of the California court, in obedience to said writ. And said true record was received by the Clerk of this court, and was filed and was docketed and given the number 804 on the October Term of 1896; all in such good time that all these things had been done, and the same were declared as done by the Hon. Clerk of this Court, in his letter dated May 8, 1897, whereas the return day of said writ was May 23, 1897.

And yet (notwithstanding said true record was returned and filed and docketed in abundant time) the record, and only record printed by the Clerk, was the false record which Mr. Hart had, on April 30th, asked

leave to print, to which was subjoined also a copy of the writ of error.

An examination of said record, so printed, shows it to consist of only: the record of the case as appealed to the California Supreme Court, the opinion, judgment, and remittitur of that court, and the writ of error.

We imagine that the Writ of Error, or any copy thereof, was not in Mr. Hart's possession when he presented the pretended record and asked leave to have it printed on April 30th, because in the first place, that was the day when the writ itself was first filed in the Clerk's office of the Supreme Court of California, and it is difficult to see how an attorney standing up before the Supreme Court in Washington City, at the time of its convening at 12 M., could hold in his hand a true copy of a writ filed in San Francisco that same day. For, owing to the geographical relations of the two places, when it is noon in Washington it is 9 A. M. in San Francisco.

Therefore, even the assistance of the telegraph could not have accomplished that result.

The true *record* did go up, and was duly filed in the Clerk's office, and has been there ever since untouched.

That record never has been printed. No demand was ever made by the Clerk upon the attorneys or counsel for plaintiffs in error to print that record.

The true record has never been before the Court; has never been on the calendar.

But on the contrary, the false record only, was printed. An examination of it shows it to have been printed probably in two jobs, there being a blank leaf or page between the two parts.

The first job printed coveres 49 pages, being merely the record and proceedings in the court below, certified by the Clerk of the California Court on April 24, 1897.

His certificate, even to that part of the record, is a little curious, since he certifies (page 49) that it "constitutes the whole of the record and proceedings, with all things concerning the same, which was commanded to be sent to the Supreme Court of the United States by the Writ of Error issued out of said Supreme Court of the United States on the 24th day of March, A. D. 1897, and that the same is made in pursuance of said writ and the command thereof."

For, his obedience to the Writ of Error was, before it was filed with him at all, and before he could have known officially of its existence.

Then comes the blank page, in such a position that the printer must have finished the job.

On the second page following is a copy of the Writ of Error.

It is preceded by the words (top of page 51):

"San Francisco, Cal., May 1, 1897.

"J. H. McKenney, Clerk of the United States Supreme Court, Washington, D. C."

Those words, while without office as any part of the record, are very significant to show that that copy of the writ did not leave San Francisco till May 1st, the day after Mr. Hart presented to this Court and obtained leave to print his false record on April 30th, and that said writ was not in his possession when he presented said record, and that said order did not include said writ.

Manifestly, a copy of the Writ of Error made in San Francisco on May 1, 1897, and transmitted to the Clerk of this Court on that day, could not have been in the possession of counsel in Washington on April 30, 1897.

We may, therefore, assume that the record presented by Mr. Hart and handed to the Clerk, did not include that copy of the Writ of Error. The order to print could not have included it.

The appearance of the transcript shows that the printer, when he finished his work, first, had no writ, so he left a blank page in the form.

How, then, did the writ of error come to be printed in that record?

We know that if a record lacks the writ of error, it is defective, and that is why we say the very presence of the writ in this questionable shape, shows that the record presented by Mr. Hart was fatally defective, and was an imposition upon the Court, and the order to print it was inadvertent, and without suspicion of the character of the motion.

Special notice should be taken of the certificate made by the Clerk of the California Supreme Court, and attached to the purported copy of the writ of error.

Observe, first, it has no date; second, it does not certify that the document is a copy of any writ of error filed or lodged in his office, or that any writ has been so filed or lodged.

But he merely certifies that the record which he has already certified on April 24, 1897, is a true, etc., copy of the record in his Court.

So that the infirmity of the false record which was presented to the Court on April 30th, and which the Court ordered printed, was not in any wise helped by the (unwarranted) addition and printing of the unauthenticated copy of the writ of error. For the assignment of errors was still lacking.

The interval, between April 30, when leave to print was obtained, and May 10, when the motion to dismiss was submitted, being but ten days, left it a physical impossibility for counsel for plaintiff in error, in San Francisco, to receive and examine and object to the false record or to supply missing parts of the record before the time the motion was made. San Francisco is five

days away from Washington. Such copy of the record as *was* printed could not have reached counsel there until nearly the day of the motion.

The *real record* reached the hands of the Clerk by or before May 8th, and was filed and docketed. No action at all has been taken upon it.

The real case still lies in the pigeon-hole undisturbed.

The eyes of the Court never have rested upon it, yet the writ of error was dismissed for supposed want of jurisdiction.

Plaintiffs in error in that case have had no day in Court; nor any opportunity to urge their federal question, for their assignments of error, though duly made and filed, were not in the record as printed.

We think we have shown, not merely that the dismissal in that case is not authority upon this federal question, but also that said cause ought yet to be placed upon the calendar and the real record examined and the case decided, whereby the other side would take no advantage from such irregular practice.

Next, we see that adverse counsel here declares (p. 57) that this precise question was again decided in another case, i. e., *Blythe* v. *Hinckley*, 173 U. S. 497.

But that too we deny. That was appeal direct from the Circuit Court of the United States upon a certificate of jurisdictional questions under the Act of 1891. The Circuit Court had dismissed the bill.

Motion was then made in this court to dismiss the appeal for want of jurisdiction.

The ground urged in the briefs and adopted by this court in granting the motion to dismiss was, that the Circuit Court dismissed the bill only for want of jurisdiction *in equity;* wherefore an appeal lay only to the Circuit Court of Appeals under the Act of 1891, and that this court had no jurisdiction.

In the opinion dismissing that appeal, this court expressly disclaimed any intention of deciding the present federal question.

But the bad practice of which we complain in securing that dismissal, was that, whereas, the notice of motion to dismiss, as served upon counsel in San Francisco, named February 6, 1899, as the day when said motion to dismiss would be made, yet in fact it was made one week in advance of that time, to wit, on January 30th, and in the absence and without the consent of counsel opposed to said motion.

The two foregoing cases are our justification for asking leave to argue this motion to dismiss, orally, not that we are entitled to do so, but because we are very much at a disadvantage in submitting so important a case upon printed briefs prepared upon such short notice. So we hope the Court will give us a hearing against this motion in open court.

On pages 59 to 62 of the brief, adverse counsel present Point III, i. e., "According to the laws of the State of "California the defendant in error was entitled to inherit "her father's estate, whether she were an alien or not."

We decline to argue the question whether Sections 671 and 672 of the Civil Code are in conflict with the Constitution of the State. Because our main proposition, if well taken, precludes not only State legislation on the subject of inheritance of land by aliens, but also forbids State constitutions from meddling with that subject.

Therefore the State Constitution, so far as it touches alien inheritance, is also void; and we care not to discuss what the California courts have said, in construing that clause of the Constitution, and declaring the State statute in question not repugnant to it. The greater question includes the less.

If States have no right to meddle with the subject of inheritance by aliens, their constitutions may no more do so than their statutes.

The fourth section of the moving brief declares, "The "power or the right to adopt a child depends upon "the law of the country of the domicile of the father, "irrespective of the place of birth or the original citizen- "ship of the child."

Here again, confusion appears to be the object sought, when counsel says:

"The authorities agree upon the proposition that an "illegitimate child, wheresoever born or residing, pos- "sesses the capacity to be legitimated according to the "law of the country of the domicile of the father."

Where the father marries the mother of a child, the marriage so shifts the domicile of mother and child as to bring them under the law of the father's domicile. Where there is no marriage the illegitimate child has only the domicile of the mother, unconnected with the father. There is no *marriage* in this case.

But what is the sense of discussing the law of domicile under California statute so long as the Federal Constitution has forbidden California to extend rights of succession to any absent alien?

If California cannot do it at all she cannot accomplish it under pretense of the law of domicile, or a law for legitimation of children, or in any other irregular or indirect manner.

It is idle to talk of "*the fact of adoption*" being a matter of exclusive State jurisdiction, while all the time, cloaking succession and heirship under it, as the result. The succession or the heirship is the thing which we insist cannot be done by the State.

We would have no objection to any adoption or legitimation having been accomplished in this case if succession and heirship had not been the results aimed at. If California's law had enacted that a man may by certain acts done legitimate and adopt an illegitimate child, but that such adoption would not result in heirship or succession, we doubt if the present constitutional objection would have any place against such a law.

But here, all the clamor concerning the law of domicile and the State regulation of the estates of deceased persons, and of rights of succession, is merely to cover, conceal, and yet accomplish that which is forbidden by the Constitution, i. e., the giving unto aliens the right of succession. We do not deny for a moment the general rule that States have the general inherent right to regulate the succession of estates. But that is all the time limited by the same constitutional prohibition that States must not, in doing so, go into the question of inheritance of land by aliens.

The last point made in the opposing brief is that two decisions of the Supreme Court of California, to wit, *Blythe* v. *Ayres*, 96 Cal. 532, and 102 Cal. 254, both adjudged that plaintiff's father was not kin of Blythe, deceased, and therefore plaintiff cannot maintain this suit.

Our reply is that in our complaint herein plaintiff alleged that his father was kin and heir and he himself is the heir and owner. Those allegations are, by demurrer, admitted to be true. Defendant cannot deny them at this late stage of the case. Next, the judgments, which counsel say are authority to the effect that plaintiff is not kin, are, if our federal question be well taken, absolutely void, and it becomes immaterial what they may have purported to adjudge.

The federal question must first be determined, and the sufficiency of those judgments, for *any* purpose, must first be established before the judgments can be appealed to as adverse counsel would like to do.

IN CONCLUSION.

This Court has now complete jurisdiction of this case. The federal question involved has never yet been decided by this Court. The State court decided it in favor of the validity of the State statute. It is now the duty of this Court to decide that federal question for itself. The writ was not taken for delay. The question is not frivolous. There is no color for the motion to dismiss. Wherefore the motion to dismiss and the motion to affirm both should be denied.

S. W. HOLLADAY AND
E. BURKE HOLLADAY,
Attorneys for Plaintiff in Error.

JEFFERSON CHANDLER AND
L. D. McKISICK,
Of Counsel.

EXHIBIT.

In the Supreme Court of the State of California

In the Superior Court of the City and County of San Francisco, State of California.
No. 63,019.

BOSWELL M. BLYTHE,
Plaintiff,
vs.
FLORENCE HINCKLEY,
Defendant.

COMPLAINT.

Boswell M. Blythe, the above-named plaintiff, complains of Florence Hinckley, the above-named defendant, and for cause of action states and alleges:

I.

The late Thomas H. Blythe at the time of his death was a naturalized citizen of the United States, residing and having his home in the City and County of San Francisco, State of California. He died intestate, on or about the 4th day of April, 1883, leaving considerable personal property and a large and valuable estate in real property. He was never married, and left surviving him no father, no mother, no wife, no legitimate child. James T. Blythe, who was a native born citizen of the United States when the said Thomas H. Blythe died, and who was the ancestor, and, in fact, the father of this plaintiff, was one of the next of kin living at the time of the death of said Thomas H. Blythe, and was one of his heirs at law, and as such heir at law entitled to inherit, and, in fact, did inherit the real estate of said Thomas H. Blythe.

The said James T. Blythe, in his lifetime, was, by inheritance as one of the heirs at law of said Thomas H. Blythe, the owner in fee and seized of an undivided interest as tenant in common with his co-heirs, of all of the real estate of which the said Thomas H. Blythe died seized. That the said James T. Blythe, the said ancestor and father of this plaintiff, departed this life since the death of said Thomas H. Blythe; that plaintiff has succeeded to, and is now the owner in fee and seized of the said undivided interest in the said real estate which was vested in his said father, James T. Blythe.

At and before the time of his death, the said Thomas H. Blythe was the owner in fee and seized and possessed of all of that parcel of real property situated in the City and County of San Francisco, State of California, and bounded and described as follows, to wit:

Beginning at a point on the southerly line of Geary street, distant 30 feet and 5 inches westerly from the westerly line of Kearny street; thence southerly on a line at right angles to the said southerly line of Geary street 50 feet and $\frac{3}{4}$ of one inch, more or less, to the northwesterly line of Market street; thence southwesterly along the said northwesterly line of Market street 384 feet and 10 and $\frac{7}{8}$ inches, more or less, to the northerly line of O'Farrell street; thence westerly along the said northerly line of O'Farrell street 40 feet and one and $\frac{1}{2}$ inches, more or less, to the easterly line of Dupont street; thence northerly along the said easterly line of Dupont street 205 feet; thence at right angles easterly 60 feet; thence at right angles northerly 20 feet; thence at right angles westerly 20 feet; thence at right angles northerly 50 feet to the said southerly line of Geary street; thence easterly along the said southerly line of Geary street 135 feet and 6 inches; thence at right angles southerly 74 feet and 6 inches;

thence at right angles westerly 30 feet; thence at right angles southerly 3 feet; thence at right angles easterly 50 feet and 6 inches; thence at right angles northerly 77 feet and 6 inches to the said southerly line of Geary street, and thence easterly along the said southerly line of Geary street 156 feet and 6 inches, more or less, to the point of beginning; being a portion of the block of land bounded by Kearny, Market, Dupont (Grant Avenue) and Geary street, all in the City and County of San Francisco, State of California.

The above described real property was at the time of the death of said Thomas H. Blythe, and has ever since been, and now is, of the value of $3,000,000 and upwards.

Plaintiff is now the owner in fee and seized of an undivided interest in and to said above described real property, and the whole thereof.

II.

The defendant, Florence Hinckley, claims to be the owner in fee and seized of said above described real property, and of the whole thereof, which said claim conflicts with that of this plaintiff.

Plaintiff states and alleges that the said claim of said Florence to said real estate grows out of, and is based *solely* upon the following facts and circumstances, and none other, namely:—

The said Florence was born in England in the year 1873, and is the illegitimate child of a woman, who was then named Julia Perry, who had never been married to any man before the birth of said Florence, and who was a native of England, and who had never, before the birth of said Florence, been out of England, and who was, and whose child the said Florence at her birth was, native-born subjects of Victoria, Queen of Great Britain

and Ireland. That said Florence and her said mother continuously remained in, and continued to live and have their home in England, and were at all times aliens to the United States, until after the death of said Thomas H. Blythe, and descent of his real property cast upon the father of this plaintiff. That said Florence, as such illegitimate alien born child, as hereinabove stated, had no inheritable blood in her veins when she was born, nor when the said Thomas H. Blythe died, and she was, therefore, incapable, by the law of nations, the common law of England and of the State of California, the Constitution of the United States, particularly Section 10 of Article I thereof, and the 14th Amendment thereto, and Section 1978 of the Revised Statutes of the United States, of inheriting said above described real property, or any part thereof, or interest thereto or therein, to the exclusion of plaintiff's said father or at all.

Plaintiff further states that in the year 1883, and after the death of the said Thomas H. Blythe, and after the title and ownership in fee of said real property had vested in the said James T. Blythe and his co-heirs, one James Crisp Perry, who was then an alien and a subject of Queen Victoria, brought the said Florence, who had, prior thereto, never been out of England, to the United States and direct to the City and County of San Francisco from her home in London, England. The said Florence was then, to wit; in 1883, an infant alien, and ineligible to become a naturalized citizen of the United States. She was, in fact, by the common law of England, and by the common law then in force in the State of California, *filia nullia*, no man's daughter, no man's heir, and incapable of succeeding to the ownership of the above real property by inheritance from Thomas H. Blythe.

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That there was not at the time of the birth of said Florence, nor at any time thereafter, any treaty in force between the United States and Great Britain under or by the terms and provisions of which the said Florence, or her mother could inherit real property situated in the State of California, or in any other State in the Union.

That said Florence, after she came to the United States and to the State of California, set up a false and unfounded claim to the said real estate, falsely pretending and falsely claiming that she had been adopted by the said Thomas H. Blythe as his daughter in his lifetime, when and while said Blythe was in California, under the provisions of Section 230 of the Civil Code of California, or that he had instituted her as his heir under the provisions of Section 1387 of said Code.

Plaintiff states and alleges that there was not at any time during the life of said Thomas H. Blythe, any law in force in England under or by the force of which the said Blythe could have adopted, legitimated or made the said Florence his daughter or his heir, or capable of inheriting real estate in the State of California; nor was there at any time during the life of said Blythe any law in force in England under or by the force of which he could have done any act or thing in the State of California by which he could have released or absolved the said Florence of and from her allegiance to her sovereign, Queen Victoria, or changed her status from that of a subject of the British Crown to that of a citizen of the United States, or infused inheritable blood into her veins. Nor was there any such valid law in force in the State of California.

III.

The plaintiff further states and alleges that after said Florence came to America in the year 1883, the same James Crisp Perry, who brought said Florence to

America, and who was then and there an alien and subject of the Queen of Great Britain and Ireland, was, without authority of law, appointed by the Superior Court of the City and County of San Francisco, guardian of the person and estate of said Florence, and thereafter, namely, after the 18th day of March, 1885, as such guardian, the said James Crisp Perry, without authority of law, commenced a special proceeding in said Superior Court in the name of said Florence under the provisions of an Act of the Legislature of the State of California, which is now Section 1664 of the Code of Civil Procedure of the State of California, and applicable only to citizens of the United States, which said special proceeding was for the purpose of having the said Court ascertain, adjudge, and determine the claim of said Florence to the heirship of said Thomas H. Blythe, and her claim to the ownership of his estate, and in substance that she, said Florence, was the daughter and sole heir of said Thomas H. Blythe under and by virtue of Sections 230 and 1387 of the Civil Code of California, or under or by virtue of one or the other of said sections; and by virtue thereof to have the said Court adjudge and decree that said Florence was the sole heir at law of the said Thomas H. Blythe, and entitled to inherit his real estate as well as to succeed to his personal estate.

Said special proceeding was commenced by filing a petition in the matter of said estate, for and in the name of said Florence, which was followed by a complaint also filed therein for and in the name of said Florence.

In both said petition and said complaint, in order to persuade and enable the said Superior Court to take jurisdiction of her person and her claim, certain facts appertaining to her claim were fraudulently and designedly suppressed, viz.: That said Florence was born in

England, the illegitimate child of Julia Perry, and that she was at all times until after descent cast, a British subject, residing and remaining in England; which facts had they not been so suppressed would have shown that she could not take said real estate by descent, or be made an heir, or made legitimate in the absence of a treaty between the United States and Great Britain, enabling her so to do.

Said special proceeding was commenced in said Court by the said Florence as sole petitioner, and thereafter such proceedings were had in said Court in said special proceeding that it was for the first time made therein to appear plainly to the Court, by evidence only as the fact was and is, that said Florence was and is an illegitimate child, that she was born out of wedlock in England, that the said Thomas H. Blythe never saw her in his lifetime, that neither she, nor her alleged mother, nor the father, nor the mother of the alleged mother of Florence had ever been within the United States until after the death of said Blythe; that they were, in fact, all aliens, and ineligible to become citizens of the United States until after the death of Thomas H. Blythe.

And in that behalf plaintiff states and alleges, upon the advice of his counsel, and upon his information and belief, that when it was so made plainly to appear to the Court as the fact was that the said Florence had been at all times during the life of said Thomas H. Blythe, a non-resident alien subject of the Queen of Great Britain and Ireland, and has never been within the United States, nor a bona fide resident within the United States, nor of the State of California, until after the death of said Thomas H. Blythe, and descent cast, and that she had no inheritable blood, and was not and could not be made his heir at law, it was the duty of the said Court to dismiss the said petition and claim of the said Florence,

in so far as the title and descent of the above described real estate to her were involved in said special proceeding, for want of jurisdiction in the Court to adjudge or decree that she was heir to the said real estate, or capable of taking the same by descent.

Plaintiff states that, nevertheless, the said Superior Court assumed jurisdiction over said Florence and over the said subject matter, to-wit: said real estate, and proceeded to hear and determine the matters, in the said petition and subsequently filed complaint of said Florence, and in substance and effect determined and adjudged that the said Thomas H. Blythe in his lifetime had adopted the said Florence as his daughter under and by virtue of the provisions of said Section 230 of said Civil Code, or had instituted her as his heir under and by virtue of the provisions of Section 1387 of said Code, notwithstanding the fact that the said Thomas H. Blythe was never in England after the birth of said Florence, nor was she ever in the United States until after his death.

And in that behalf plaintiff states and alleges the fact to be that, although it was plainly so made to appear to the Court that said Florence was an alien born illegitimate child, a British subject, who had at all times prior to the death of said Thomas H. Blythe, been in England, and a minor, who was ineligible to become a citizen of the United States under the naturalization laws thereof, the said Superior Court, in giving its decision in favor of said Florence, and against said Abbie Ayres, James T. Blythe and others, confined its decision to three questions:

First, whether said Florence was the child of said Thomas H. Blythe? Second, whether or not the said Thomas H. Blythe in his lifetime had adopted and legitimated said Florence under and by virtue of Section 230 of the Civil Code of California? Third, whether or not

said Thomas H. Blythe had in his lifetime instituted the said Florence as his heir under the provisions of Section 1387 of said Civil Code? All of which questions, and no other, said Superior Court decided in the affirmative and in favor of said Florence; and the plaintiff, upon his information and belief, states that said decision did not determine the question of heirship, title, or interest in or to the said real estate of the said Thomas H. Blythe, in California, for want of jurisdiction in said Court to determine that said Florence was or could be an heir to the real estate of said Thomas H. Blythe in California, or capable of inheriting the same in the absence of a treaty then in force between the United States and the United Kingdom of Great Britain and Ireland, therein giving to the said Florence the right to inherit the real estate of said Thomas H. Blythe. And in that behalf plaintiff states that the Legislature of the State of California had no power or authority to enact, nor did it enact, any law which would, or was intended to, operate upon persons or things beyond the territorial limits of the United States, or under or by virtue of which a citizen of the United States could do any act or thing by which an illegitimate, unnaturalized alien child could be made capable of inheriting real estate of an intestate, who during all the time said acts and things were claimed to have been done, was living in the State of California, and who died in said State, nor did said Section 230 nor Section 1387 so operate. Nor did any Court of the State of California have jurisdiction to extend and make operative any law of the State of California beyond the territorial limits of the United States. Yet said Court did, without jurisdiction, decree said Florence to be the owner of said real estate by succession.

Plaintiff further states that from said judgment of said Superior Court an appeal was taken to the Supreme

Court of the State of California, when all the matters and things hereinbefore stated, touching and concerning the said Florence and Thomas H. Blythe, were made plainly to appear to said Supreme Court in the record on said appeal, and therein showing that neither the said Superior Court nor said Supreme Court had jurisdiction to decide the matter in controversy involving the title and ownership to said real estate in said special proceeding in favor of the said Florence, nevertheless the said Supreme Court, without jurisdiction so to do, by a bare majority of the Judges who heard said appeal on said special proceeding, and participated in the decision thereof, affirmed the judgment of said Superior Court upon the ground that the said Thomas H. Blythe had instituted said Florence as his heir under said Section 1387, though he had not adopted her under said Section 230.

Neither the said Superior Court nor said Supreme Court decided or determined the question whether Sections 671 and 672 of the Civil Code of California, as applied to the claim of said Florence, to take said real estate in California by descent, were or were not in violation of Section 10 of Article I of the Constitution of the United States; nor whether said Florence could take said real estate by descent, in the absence of a treaty between the United States and Great Britain, enabling her to take said real estate; nor whether said courts were or were not without jurisdiction to adjudge said real estate to said Florence upon her said claim as the heir of said Thomas H. Blythe, in the absence of a treaty between the United States and Great Britain, enabling her to take said real estate by succession; nor whether any statute passed by the State of California, purporting to enable a non-resident, illegitimate alien British subject, such as said Florence, to take real estate by succession, is not in violation of, and repugnant to

Section 10 of Article I of the Constitution of the United States. And in that behalf plaintiff states and alleges that said decision of said Supreme Court is null and void for want of jurisdiction in said Court to decide that said Thomas H. Blythe could, under said Section 1387, or under any law of the State of California, infuse inheritable blood into the veins of a non-resident illegitimate alien who at all times after her birth and during the lifetime of said Thomas H. Blythe had her home and allegiance only in England and continuously resided outside of and beyond the territorial limits of the United States and of the State of California until after the death of said Thomas H. Blythe and descent cast. Nor could the said Florence consent thereto, or take any such heirship upon herself, she being then an infant and incapable of so doing. Plaintiff further states that said decision of said Superior and Supreme Courts was made in a proceeding entitled *Florence Blythe* v. *Abbie Ayres et als.*, and is reported in 96 California Reports at page 532 *et seq.*, to which reference is here made. And in that behalf this Court will see upon an examination thereof that said Supreme Court in deciding in favor of said Florence overruled former decisions made by said Court construing statutes of the State of California, which said Sections 230 and 1387 of said Civil Code were mere continuations of said statutes by virtue of Section 5 of said Civil Code, which said former decisions, so overruled by said decision in *Blythe* v. *Ayres*, had established a rule of property in the State of California, which rule of property was in force in said State when the said Thomas H. Blythe died, and under and by virtue of which the next of kin of said Thomas H. Blythe, including the said James T. Blythe, inherited the real estate of the said Blythe long before the said Supreme Court made its decision in said proceeding of

Blythe v. *Ayres* in and by which said decision said Court attempted to divest and destroy the title and interest in said above described real estate which had vested in said James T. Blythe *eo instanti*, the death of said Thomas H. Blythe. And in that behalf plaintiff states that said decision of said Supreme Court was and is absolutely null and void for want of jurisdiction in said Court to make the same.

Plaintiff further states and alleges that the said special proceeding which terminated in said decision of said Supreme Court in *Blythe* v. *Ayres*, hereinbefore mentioned and referred to, was commenced in said Superior Court October 1, 1885, by said Florence, and was conducted throughout under the provisions of the Act of the Legislature of the State of California, approved March 18, 1885, and which was then and now is Section 1664 of the Code of Civil Procedure of said State. Plaintiff further states and alleges that the Legislature of the State of California passed another Act, which was approved March 8, 1889, which ever since it was passed has been and is now Section 1663 of said Code of Civil Procedure, in and by the first provision of said section it was enacted among other things as follows, namely:—

"At any time after the lapse of one year from the issuance of letters testamentary or of administration, any heir, devisee, or legatee may present his or her petition to the Court for distribution of the net proceeds of the share of said estate to which he or she will be entitled. Notice of the application must be given as required by Section sixteen hundred and fifty-nine. The executor or administrator, or any other person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself." Plaintiff further states and alleges that after the said Section 1663 be-

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came a law, namely, on June 18, 1894, the said Florence did, under the provisions of said Section 1663, present her petition to said Superior Court of the City and County of San Francisco, wherein the administration of the estate of said Thomas H. Blythe was then pending, to have distributed to her the net proceeds of the share of said estate to which she, without right thereto, claimed to be entitled, to wit: the whole of said estate, real and personal. Plaintiff, in that behalf, states that the said petition of said Florence for distribution so presented to said Court was an original, independent, special proceeding, and her said claim to said estate so therein set up was based solely upon the record of the proceedings and judgment had and made by said Superior and Supreme Courts in the said proceedings of *Blythe* v. *Ayres*, hereinbefore referred to, and upon no other claim or right whatever. Plaintiff states that in due time the said James T. Blythe, who was then and there a person interested in said estate, namely, one of the next of kin and lawful heir of said Thomas H. Blythe, appeared in said last mentioned proceedings under and by virtue of the right given to him so to do in said Section 1663, and did then and there resist the application of said Florence to have distributed to her any part or share of said estate, and in that behalf plaintiff states that it was made plainly to appear to said Court upon the face of the said petition of said Florence that the said Thomas H. Blythe was at and before his death, namely, on and ever after August 31, 1855, a naturalized citizen of the United States; that Florence was born in England on December 18, 1873, and was the illegitimate child of one Julia Perry, then an unmarried woman; that the said Thomas H. Blythe was never in England, nor in any other country in Europe, after August 29, 1873, nor was the said mother of said Florence, nor said Florence ever out of

England, or within any part of the United States, or on the continent of America, until after the death of said Thomas H. Blythe and descent cast. And it was further made plainly to appear to said Court that the said Florence was born a subject of Victoria, Queen of Great Britain and Ireland, and always remained such subject until after the death of said Thomas H. Blythe; and that the law of the State of California, as embodied in Sections 230 and 1387 of the Civil Code thereof, is not and never has been the law in the United Kingdom of Great Britain and Ireland, nor has there ever been in said United Kingdom any law of adoption, or any law by which an illegitimate child born and living in England could, by an acknowledgment in writing, or otherwise, be instituted as, or become the heir of any man living in or out of England, or any law by which an illegitimate child could be made legitimate or adopted as the child or heir of its putative father, all of which matters and things last alleged as appearing on the face of said petition this plaintiff alleges to be true in fact. And the plaintiff further states that the said petition and application of said Florence came on to be heard by said Court and before the Court, and were tried by the said Court, and that upon the said hearing and trial of said proceeding all of the matters and things hereinbefore alleged appeared on the face of said petition for distribution, and the same were put in evidence by the said Florence in support of her said petition to have said estate of Thomas H. Blythe distributed to her. In that behalf this plaintiff alleges that when said petition was presented to said Court at the hearing thereof, and said evidence was offered to be introduced by the said Florence on the said trial, it was the plain duty of said Court to dismiss the said petition of said Florence in so far as the real estate of the said Thomas H. Blythe was involved for want of

jurisdiction in said Court to distribute to her any part or share of said real estate above described without proceeding further to hear said matter, as to said real estate upon said petition.

Plaintiff further states and alleges that at the said hearing and trial of said petition the said Florence offered in evidence the entire record, including the judgments and decrees of said Superior Court and of said Supreme Court in the proceeding hereinbefore referred to as *Blythe* v. *Ayres*.

Plaintiff further states and alleges that when and at the time the said Florence offered said record in evidence, the said James T. Blythe and his co-heirs and tenants in common with him, who then was and were the owners of said above described real estate, objected to the introduction of said record upon several grounds, and among them the following, viz.: That said record and said alleged judgment of October 22, 1890, in the matter of the proceeding of *Blythe* v. *Ayres et als.*, and the alleged affirmance thereof by the Supreme Court, ought not to be received in evidence on the grounds that the said alleged judgment was and is illegal, unconstitutional, and void, for the reason that said courts had no jurisdiction to render the same upon the facts there found, stated and set forth in said record and in the written decision of said Court, and as set out in the petition for distribution; that to render such a judgment upon such facts was to legislate judicially after descent cast; and thereby and by such judicial legislation to deprive the said James T. Blythe of his property without due process of law, and to deprive him of the equal protection of the law, in violation of the provisions of the Constitution of the United States, and particularly in violation of the pro visions of Section 10 of Article I of said Constitution, and of the provisions of Section 1 of Article XIV of

the Amendment thereto; that there was not at the time of the death of said Thomas H. Blythe, to wit: April 4, 1883, nor at the time when said judgment was rendered, nor at the time of the trial then before said Court, any law upon the statute books, or in the codes, or decisions of the Supreme Court of the State, authorizing the giving of, or giving to the said Court jurisdiction to give or make said alleged judgment upon the said facts. Plaintiff states that said Superior Court overruled the above and all other objections made by the said James T. Blythe to the introduction of said evidence by the said Florence, and the same was admitted, and thereupon, on October 26, 1894, said Superior Court without allowing the said James T. Blythe, but refusing to allow him, to offer any evidence in the matter, either in support of his claim to said estate, or in opposition to the claim of said Florence thereto, proceeded to and did give, make, and file in said matter and estate its decision in writing, purporting to be in favor of said Florence, and did adjudge that she was entitled to have said estate, and the whole thereof, including said above described real estate, distributed to her, without jurisdiction so to do as to said real estate. And the said Court thereafter, on June 18, 1894, did make and cause to be entered its decree distributing the above real estate to the said Florence, and caused the possession thereof to be delivered to her.

Plaintiff states that thereafter, namely, after said decree purporting to distribute said real property to said Florence was given, made and entered, and within the time prescribed by law, the said James T. Blythe appealed from said decree to the Supreme Court of the State of California, and duly and regularly perfected his said appeal by doing all the acts prescribed by law in that behalf, and caused a record of said proceedings to be

printed and filed with the Clerk of said Supreme Court within the time prescribed by law and by the rules of said Court; that by virtue of said appeal and by the law in that behalf, the said proceedings and decree of distribution were removed and transferred out of and from said Superior Court and into said Supreme Court and remained pending therein, and plaintiff states that while said appeal was so pending, and before the same was tried, and before the same was called for trial in said Supreme Court, and before any decision was therein given or made, namely: on June 11, 1895, the said James T. Blythe, the ancestor and father of this plaintiff, died, at his home in Downey, in the County of Los Angeles, State of California, and thereupon and thereafter this plaintiff, who was then one of the heirs at law of said James T. Blythe, succeeded to the interest of his said father, as tenant in common with other next of kin, of which said Florence was not one, to the real estate above described.

Plaintiff further states that neither the said Florence, nor any one else, ever suggested the death of James T. Blythe in said Supreme Court, nor did the said Florence, nor any one else, revive or prosecute said proceedings or said appeal of the said James T. Blythe in said Supreme Court, nor was the personal representative, or the heirs or devisees of said James T. Blythe ever made parties to said proceedings or to said appeal, nor did they, or any or either of them ever appear in said proceedings in said Supreme Court. And in that behalf plaintiff alleges that said Supreme Court never had jurisdiction of the said James T. Blythe, nor of his personal or real representatives at any time after June 11, 1895, the date of the death of said James T. Blythe. Nor did it ever at any time before or after the death of said James T. Blythe have jurisdiction to affirm said decree and judg-

ment of said Superior Court purporting to distribute, or purporting to order the said real estate to be distributed to said Florence. Plaintiff states that without any right, power, or jurisdiction so to do, the said Supreme Court did afterwards hear said appeal of the other parties thereto, and on November 30, 1895, made a decision purporting to affirm said illegal and void judgment and decree of said Superior Court, and thereafter sent its remittitur to said Superior Court, and thereafter, to wit: on the 4th day of December, 1895, the possession of said real estate and the whole thereof, was delivered by the Court to the said Florence pursuant to said illegal and void judgment, and not otherwise, nor by any other right or claim thereto whatever. The said Florence has, ever since said 4th day of December, 1895, been and now is in possession of said real estate, and has ever since been and now is collecting the rents, issues and profits of said real estate and appropriating the same to her own use and to the use of her creditors and other persons who claim an interest in said real estate under her, and not otherwise.

Plaintiff further states and alleges, upon his information and belief, that said Florence sets up and claims that she was entitled to inherit, and did in fact inherit, the real estate of which the said Thomas H. Blythe died seized, by virtue of Section 671 of the Civil Code of California, which is in the words following, namely:—

"Any person, whether citizen or alien, may take, hold, and dispose of property, real and personal, within this State."

In that behalf plaintiff states that said Section 671 was adopted and passed by the Legislature of the State of California, March 30, 1874; that thereafter, and in the year 1879, the people of the State of California

ordained a New Constitution for the said State, which went into force and became the organic law of the State January 1, 1880, before the death of said Thomas H. Blythe; that in and by Section 17 of Article I of said New Constitution it was ordained as follows, namely:—

"Foreigners of the white race or of African descent eligible to become citizens of the United States under the naturalization laws thereof, while *bona fide* residents of this State, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as native-born citizens."

And by Section 22 of said Article I it was ordained as follows, namely:—

"The provisions of this Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise."

And by Section 1 of Article XXII of said Constitution it was, among other things, ordained as follows, namely:—

"The provisions of all laws which are inconsistent with this Constitution shall cease upon the adoption thereof, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in full force until the first day of July, eighteen hundred and eighty, unless sooner altered or repealed by the Legislature."

And in that behalf plaintiff states that said Section 671 of said Civil Code was and is an attempt on the part of the Legislature of the State of California to invade and encroach upon the treaty-making power of the United States, contrary to and in violation of Section 10 of Article I of the Constitution of the United States.

Said Section 671 is also null and void by reason of the fact that it is plainly inconsistent with Section 17 of Article I of said Constitution of California, and that therefore said Section 671 ceased to be a law of the State of California upon the adoption of said Constitution.

And plaintiff further states that said Florence could not and did not inherit the real estate of said Thomas H. Blythe under the provisions of said Section 17 of said Article I of said Constitution by reason of the facts that she was ineligible to become a citizen of the United States under the naturalization laws thereof, nor was she a *bona fine* resident of the State of California when the said Thomas H. Blythe died, and his said real estate, including the real property above described, descended to his next of kin, including the said James T. Blythe.

And plaintiff further states that said Section 17 of Article I of the Constitution of the State of California is absolutely null and void by reason of the fact that it is an attempt by the people of the State of California to invade and encroach upon the treaty-making power of the United States, contrary to and in violation of Section 10 of Article I of the Constitution of the United States.

Plaintiff further states, upon his information and belief, that said Florence sets up, and pretends to claim, that she had and has the right to take said above-described real estate by succession as heir of said Thomas H. Blythe under and by virtue of the provisions of Section 672 of said Civil Code of California, which is in the words and figures following, namely:

"If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such

case is disposed of as provided in Title VIII, Part III, Code of Civil Procedure."

In that behalf plaintiff states that said Section 672 is null and void by reason of the fact that it is an attempt on the part of the Legislature of the State of California to invade and encroach upon the treaty-making power of the United States and is in conflict with and contrary to Section 10 of Article I of the Constitution of the United States. The said Section 672 has no application to said Florence by reason of the fact that she was not at the time of her birth, nor at any time thereafter, given the right of succession to the said above described real property by a treaty or any treaty in force between the United States and the United Kingdom of Great Britain and Ireland.

Plaintiff further states and alleges, upon his information and belief, that each and every claim, or pretended claim, or right to said real property set up and insisted upon by said Florence of a right by her to inherit, hold, possess, or enjoy said above described real property under Section 230 or under Section 671, or under Section 672, or under Section 1387 of the Civil Code of California, or under any other law or claim of right, is groundless, fictitious, absolutely false, unfounded in fact or in law, and without any meritorious right whatever.

Plaintiff further states and alleges that said above described real property is situated on Market, Geary, Dupont and O'Farrell streets, in the City of San Francisco, and the same is there located in and near the heart of the business center of said city. That the same is improved, built upon, and almost entirely covered with store-houses, shops and other business houses, and the same have been ever since said Florence went into possession thereof and now are occupied by tenants of said Florence, who pay, in the aggregate, large sums of money to said Flor-

ence every month, namely: twelve thousand dollars, and that the same, in the aggregate, net to said Florence and to those who claim under her $100,000 per annum for each and every year since she has been in possession thereof.

And plaintiff further states that all of the personal estate of which the said Thomas H. Blythe died possessed was exhausted in the expenses of administering the estate of said Blythe, and that none of said personal estate ever came into the possession of the said Florence save and except a leasehold property situated on the southeast corner of Geary street and Grant avenue, in said City of San Francisco, which is not sued for in this action and is expressly excepted.

Plaintiff further states and alleges that said Florence owes and is indebted to divers persons, unknown to plaintiff, in sums aggregating, as plaintiff is informed and believes, $300,000 and upwards; that she has heretofore made and entered into written contracts and agreements with her lawyers and agents and other persons, which are now in force and by which she promised and agreed to assign or convey to said lawyers, agents and other persons large and valuable interests or shares in said above described real estate and other property of the estate of said Thomas H. Blythe; and plaintiff is informed and believes, and upon his information and belief states and alleges, that said Florence has offered to sell and convey portions of said above described real property, and has offered and tried to settle with some of her creditors and others having valid claims against her and to pay off and discharge her liabilities to them by conveying to them portions of said real estate, and that she has mortgaged the said real estate, or parts thereof, and borrowed money thereon to secure the payment of her debts and liabilities. That said Florence is wholly

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and hopelessly insolvent, that she has no means or property whatever, nor anything of any value whatever; that all the rents and profits from said real estate heretofore received by her have been expended and totally exhausted, and the same will continue to be expended and exhausted by her as fast as the same are collected and received by her; that all those already collected and expended are and will ever remain a total loss to plaintiff and all those which will be hereafter collected by her while and as long as this action against her shall remain pending will be expended by her and will likewise be a total loss to plaintiff, to his great and irreparable damage and injury.

Plaintiff further states and alleges that unless the said Florence be restrained and enjoined by this Court, or a Judge thereof, from so doing, she will transfer and convey, or mortgage, or otherwise cloud the title of said real property, to divers persons, and thereby cause a multitude of claims to said property conflicting with the claim, right and title of plaintiff, and thereby compel him to resort to a multiplicity of actions against those divers persons to enforce his right to said real estate and to clear up his title thereto.

Wherefore, and in consideration of the premises, plaintiff prays the Court as follows, namely:

I.

Plaintiff prays the Court or a Judge thereof, for an order or decree appointing a receiver, and therein ordering, commanding and directing such receiver to take immediate possession of the said above described real property, and the whole thereof, and therein ordering, commanding, and directing the tenants in possession, and each and every one of them, to attorn to such receiver and to pay rent to him, and to no one else; and therein

authorize and direct such receiver to collect and receive the rents from the tenants in possession at the rate they and each of them have agreed to pay for the premises occupied by them, or either, and that when any of said premises become vacant to re-rent the same to good tenants; and with such other and further authority and directions as the Court may think proper.

II.

And plaintiff further prays the Court, or a Judge thereof, to grant and issue a restraining order and an injunction, directed to the defendant, Florence Hinckley, and to her agents, employees, servants, creditors, and all other persons whomsoever who claim or pretend that they have any demands against or upon said real estate, restraining and enjoining the said Florence and the said other persons, and each and every one of them severally, from granting or receiving grants or other conveyances of or to any of said property, and from in any way encumbering the same by mortgages, attachments, or otherwise or at all, and from in any manner, shape or form interfering with the said receiver in his taking or retaining possession of said property and managing the same under the orders and directions of the Court. And upon the trial and decision of this action that the said injunction be made perpetual.

III.

And plaintiff further prays for the judgment of the Court deciding that the said conflicting claim of the said defendant Florence Hinckley is illegal, unfounded, false and without merit, and that plaintiff, as against her and her claim, is the lawful owner in fee of the said above described real property and the rents, income and profits, and the whole thereof, and that his title thereto, and estate therein, be quieted. And that the said defendant

be perpetually enjoined from setting up any claim whatever thereto, and to any right, title or interest therein or thereto. And that the possession, with the accumulated rents of said property in the hands of the receiver, be delivered to the plaintiff.

IV.

And plaintiff prays for all such other and further and particular relief as to the Court may seem meet and proper. And the plaintiff prays for general relief.

S. W. & E. B. HOLLADAY, Attorneys for Plaintiff.

L. D. McKISICK, Counsel for Plaintiff.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

Boswell M. Blythe, being duly sworn, deposes and says: That he is the plaintiff named in the foregoing complaint; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, he believes it to be true.

BOSWELL M. BLYTHE.

Subscribed and sworn to before me this 15th day of February, 1898.

[Seal] N. E. W. SMITH,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 16, 1898.

C. F. CURRY, Clerk,

By Joseph Riordan, Deputy Clerk.

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

The defendant, Florence Blythe Hinckley, sued in this action under the name of Florence Hinckley, demurs to the complaint in the above-entitled action filed by the said plaintiff, upon the following grounds:—

I.

Said complaint does not state facts sufficient to constitute a cause of action.

II.

Said complaint does not state facts sufficient to constitute a cause of action, because it appears upon the face thereof and is therein stated, that in a proceeding instituted and prosecuted under Section 1664 of the Code of Civil Procedure of the State of California, in the Superior Court of said City and County, in the name of and for said defendant, and under the complaint of said defendant filed in said proceeding, it was determined and adjudged by said Court that Thomas H. Blythe, who is mentioned in said complaint, in his lifetime had adopted said defendant as his daughter under and by virtue of the provisions of Section 230 of the Civil Code of the State of California, and it appears upon the face of said complaint that said proceeding was finally determined upon appeal to the Supreme Court of the State of California, and that said judgment has become final and continues in full force and effect, and was affirmed by said Supreme Court, and that thereby the title of this defendant to all of the property mentioned in the complaint in this action was finally and conclusively determined and established against James T. Blythe, mentioned in said complaint, and against the entire world, and that the said James T. Blythe thereby

became estopped, and the plaintiff, as his son and heir, is estopped, from having or making any claim to any of said property described in the complaint in this action.

III.

Said complaint does not state facts sufficient to constitute a cause of action, because it appears upon the face thereof that under the petition of said defendant presented to said Superior Court under the provisions of Section 1663 of the Code of Civil Procedure of the State of California, in which Court the administration of the estate of said Thomas H. Blythe, deceased, was then pending, and upon the hearing and trial under said petition, and on the 26th day of October, 1894, said Court gave, made and filed in said matter and estate its decision in writing in favor of said defendant, and did adjudge that she was entitled to have the whole of the said estate of said Thomas H. Blythe, deceased, distributed to her, and that said Superior Court, under said petition, did make and cause to be entered the decree of said Court distributing the real estate described in the complaint in this action to this defendant; and it appears upon the face of the complaint herein that said judgment and decree continues in full force and effect, and has never been in any wise reversed, set aside or modified, and that by said judgment and decree the said James T. Blythe became estopped, and the said plaintiff, as his son and heir, is estopped from having or maintaining any claim to said real estate or any part thereof.

IV.

Said complaint does not state facts sufficient to constitute a cause of action, in that it appears upon the face thereof that said defendant was instituted heir of said Thomas H. Blythe, deceased, under the provisions of Sec. 1387 of the Civil Code of the State of California.

IVa.

Said complaint is uncertain, in that it is therein alleged that James Crisp Perry was, without authority of law, appointed by the Superior Court of the said city and county guardian of the person and estate of said defendant, but there is no statement in said complaint wherein said appointment was without authority of law, and said complaint is uncertain in that particular.

V.

Said complaint is uncertain, in that it is therein alleged that James Crisp Perry, without authority of law, commenced a special proceeding in said Superior Court, in the name of said defendant, under the provisions of Section 1664 of the Code of Civil Procedure of the State of California, but there is no statement in said complaint wherein the commencement of said special proceeding was without authority of law, and said complaint is uncertain in that particular.

VI.

Said complaint is ambiguous in the following particular, to wit: It is alleged in said complaint that James T. Blythe, who is therein mentioned, was the owner in fee and seized of an undivided interest of all of the real estate of which said Thomas H. Blythe died seized, and that upon the death of the said James T. Blythe said plaintiff succeeded to and is the owner in fee and seized of an undivided interest in said real estate, and yet said complaint alleges and sets forth what is in conflict with said statements by alleging that in a proceeding commenced and prosecuted in said Superior Court for and in the name of said defendant under Section 1664 of the Code of Civil Procedure of the State of California, it was determined and adjudged by said Court that said

Thomas H. Blythe in his lifetime had adopted said defendant as his daughter under and by virtue of the provisions of Section 230 of the Civil Code of the State of California, and that said judgment was affirmed by the Superior Court of the State of California, and it appears from the allegations of said complaint that the said judgment has never been in any manner reversed, set aside, or modified, but continues in full force and has become final, and that thereby it has been determined and adjudged that this defendant was and is the heir of Thomas H. Blythe, deceased, and that she is the owner in fee, and has been the owner in fee, since the time of the death of said Blythe, of all of the real estate of which said Thomas H. Blythe died seized, including the real estate described in said complaint; and said complaint further alleges and sets forth what is in conflict with the aforesaid statements therein as to the alleged ownership of James T. Blythe of an interest in said real estate, and of the alleged ownership of the plaintiff of an interest in said real estate, by stating that under the petition for distribution presented by said defendant to said Superior Court under Section 1663 of the Code of Civil Procedure of the State of California, said Court did adjudge that said defendant was entitled to have the whole of said estate of said Thomas H. Blythe, deceased, including the real estate described in said complaint, distributed to her, and it appears from the statements in said complaint that said adjudication has never been in any wise reversed, set aside, or modified, and that the said judgment continues in full force and is conclusive of the title of said defendant in fee to all of said real estate, and that said plaintiff has no title to or interest in any of said real estate.

VII.

Said complaint is also ambiguous in the following par-

ticulars, to wit: It is therein alleged that the said Superior Court, in giving its decision in favor of said defendant and against Abbie Ayres, James T. Blythe, and others, confined its decision to three questions, which three questions are stated in said complaint, and it is alleged in said complaint that all of which questions, and no other, said Superior Court decided in the affirmative and in favor of said defendant; and it is alleged in said complaint that said decision did not determine other questions in relation to whether this defendant was or could be an heir to the real estate of said Thomas H. Blythe in California, and yet said complaint alleges and sets forth what is in conflict with said statements by alleging that in said proceeding commenced and prosecuted in said Superior Court for and in the name of said defendant under Section 1664 of the Code of Civil Procedure of the State of California, it was determined and adjudged by said Court that said Thomas H. Blythe in his lifetime had adopted said defendant as his daughter, under and by virtue of the provisions of Section 230 of the Civil Code of the State of California, and it thus appears from the statements of said complaint that all questions relating to the proposition whether said Blythe had adopted said defendant as his daughter under said section were involved and included in said adjudication made by said Court that said defendant had been thus adopted by said Blythe, and that all of said questions were finally determined and concluded by said adjudication of said Court.

VIII.

Said complaint is also ambiguous in the following particulars, to wit: It is therein alleged that neither the said Superior Court nor said Supreme Court decided or determined the question whether Sections 617 and 672

of the Civil Code of California, as applied to the claim of the defendant to take said real estate in California by descent, were or were not in violation of Section 10 of Article I of the Constitution of the United States; nor whether said Florence could take said real estate by descent, in the absence of a treaty between the United States and Great Britain enabling her to take said real estate; nor whether said courts were or were not without jurisdiction to adjudge said real estate to her upon her claim as the heir of said Thomas H. Blythe, in the absence of a treaty between the United States and Great Britain enabling her to take said real estate by succession; nor whether any statute passed by the State of California, purporting to enable a non-resident, illegitimate alien British subject to take real estate by succession is not in violation of and repugnant to Section 10 of Article I of the Constitution of the United States; and yet, said complaint alleges and sets forth what is in conflict with the said statements by alleging the aforesaid proceeding under Section 1664 mentioned in said complaint and the adjudication of said Superior Court in said proceeding determining and adjudging that said Thomas H. Blythe in his lifetime had adopted said Florence as his daughter under and by virtue of the provisions of said Section 230 of said Civil Code, which necessarily included an adjudication that said Superior Court had jurisdiction to thus determine and adjudge that she had been thus adopted, and necessarily included all of the aforesaid questions which said complaint thus states were not decided nor determined by said Superior Court nor by said Supreme Court.

IX.

Said complaint is also ambiguous in the following particulars, to wit: Because it is therein alleged that the claim to said real property set up by said defendant of a

right by her to inherit, hold, possess, or enjoy the same, is groundless, fictitious, absolutely false, unfounded in fact or law, and without any meritorious right whatever, and yet said complaint alleges and sets forth what is in conflict with said statements by alleging the proceedings therein stated to have been had under said Section 1664 of the Code of Civil Procedure, and the determination and adjudication of said Superior Court in said proceedings that said Thomas H. Blythe in his lifetime had adopted said defendant as his daughter under and by virtue of the provisions of said Section 230 of the Civil Code, and that said judgment had been affirmed by the Supreme Court of this State; and from the allegations of said complaint it appears that said judgment continues in full force and has become final, and that the heirship of said defendant to the Estate of Thomas H. Blythe, deceased, was thus established and confirmed; and said complaint further alleges and sets forth what is in conflict with the aforesaid statements therein, that the claim of said defendant to said real estate is groundless and unfounded, by stating the proceedings mentioned in said complaint under the petition for distribution presented by said defendant to said Superior Court, and the adjudication thereunder that said defendant was entitled to have the whole of the said estate of said Thomas H. Blythe, deceased, distributed to her; and it appears from the statements in said complaint that the said adjudication is in full force and is conclusive of the title of said defendant in fee to all of said real estate.

X.

Said complaint is unintelligible in the particulars mentioned in paragraph VI hereof.

XI.

Said complaint is unintelligible in the particulars mentioned in paragraph VII hereof.

XII.

Said complaint is unintelligible in the particulars mentioned in paragraph VIII hereof.

XIII.

Said complaint is unintelligible in the particulars mentioned in paragraph IX hereof.

XIV.

Said complaint is uncertain in the particulars mentioned in paragraph VI hereof.

XV.

Said complaint is uncertain in the particulars mentioned in paragraph VII hereof.

XVI.

Said complaint is uncertain in the particulars mentioned in paragraph VIII hereof.

XVII.

Said complaint is uncertain in the particulars mentioned in paragraph IX hereof.

XVIII.

Said complaint is also uncertain in the following particulars;

1st. In stating that there was a want of jurisdiction in said Superior Court to adjudge or decree in the aforesaid special proceeding mentioned in said complaint

under said Section 1664 that said defendant was the heir to the said real estate or capable of taking the same by descent; without stating in said complaint wherein there was a want of jurisdiction in said Court to thus adjudge or decree.

2nd. In alleging in said complaint, that there was a want of jurisdiction in said Superior Court to determine that said defendant was or could be an heir to the real estate of said Thomas H. Blythe in California, or capable of inheriting the same; without stating in said complaint wherein there was a want of jurisdiction in said Court to thus determine.

3rd. In stating in said complaint, "Yet said Court "did, without jurisdiction, decree said Florence to be "the owner of said real estate by succession;" without stating wherein said Court was without jurisdiction to thus decree.

4th. In stating in said complaint, that it was made plainly to appear to said Supreme Court in the record on the appeal from the decree of said Superior Court in said proceeding under said Section 1664, that neither said Superior Court, nor said Supreme Court, had jurisdiction to decide the matter in controversy, involving the title and ownership to said real estate in said special proceeding in favor of said defendant; without stating what was made to appear to said Supreme Court in said record to show that neither said Superior Court, nor said Supreme Court, had jurisdiction to decide the matter in controversy involving the defendant's title and ownership to said real estate in said special proceeding in favor of said defendant.

5th. In stating in said complaint, that said Supreme Court, without jurisdiction, affirmed the judgment of said Superior Court in said special proceeding; without

stating in said complaint wherein said Supreme Court was without jurisdiction to affirm said judgment.

6th. In stating in said complaint, that the decision of said Supreme Court affirming the judgment of said Superior Court in said proceeding under Section 1664 is null and void for want of jurisdiction in said Court; without stating wherein said Supreme Court was without jurisdiction to affirm said judgment.

7th. In stating in said complaint, that it was the plain duty of said Superior Court to dismiss the petition of said defendant in so far as the real estate of said Thomas H. Blythe was involved for want of jurisdiction in said Court to distribute to her any part or share of said real estate; without stating in said complaint wherein said Superior Court did not have jurisdiction to distribute to her said real estate.

8th. In stating in said complaint, that said Court had no jurisdiction to render the judgment and the affirmance of the judgment in the proceeding of *Blythe* v. *Ayres et al.*, mentioned in said complaint; without stating why the said courts did not have such jurisdiction.

9th. In stating in said complaint, that the Supreme Court did not have jurisdiction to affirm the decree and judgment of the Superior Court purporting to distribute the said real estate to this defendant and ordering the distribution of the same to her, and in stating that the said Supreme Court, without any right, power or jurisdiction so to do, did make a decision purporting to affirm said judgment and decree; without stating in said complaint why said Supreme Court did not have jurisdiction to affirm said decree and judgment.

Wherefore said defendant prays judgment that this demurrer be sustained, and that the plaintiff take nothing by this action, and for her costs and disbursements herein.

WM. H. H. HART, Attorney for Defendant.
GARBER, BOALT & BISHOP, W. W. FOOTE, AYLETT R. COTTON, Of Counsel.

[Endorsed:] Service of the within and receipt of a copy thereof is hereby admitted this 28th day of February, A. D. 1898.
S. W. & E. B. HOLLADAY, Attorneys for Plaintiff.

Filed 4:50 P. M., March 1, 1898. C. F. CURRY, Clerk. By T. C. Maher, Deputy Clerk.

JUDGMENT.

[Title of Court and Cause.]

In open Court, March 4th, 1898. No. 63,019.

The demurrer of the defendant to the plaintiff's complaint herein coming on regularly for hearing on this 4th day of March, A. D. 1898, said defendant appearing by Wm. H. H. Hart, Esq., her attorney, and A. R. Cotton, of counsel, and the plaintiff appearing, E. B. Holladay, his attorney, and L. D. McKisick, Esq., of counsel, and the Court having heard the demurrer and argument of counsel, and the demurrer being submitted to the Court for decision, and the Court being fully advised in the premises, it is considered, ordered and adjudged by the Court that the said demurrer be and the same is hereby sustained, and it is ordered and adjudged by the Court that the defendant have judgment against said plaintiff upon the merits of this action and that judgment be entered accordingly.

Wherefore by virtue of the law and by reasons of the premises aforesaid, it is ordered, adjudged and decreed that Boswell M. Blythe, plaintiff, do take nothing by this his said action as against Florence Hinckley, defend-

ant, but that judgment be and the same is hereby entered against said plaintiff and in favor of said defendant for her costs incurred herein, amounting to the sum of $2.50.

Judgment recorded, March 8, 1898, Book 38, page 648.

NOTICE OF APPEAL.

[Title of Court and Cause.]

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the Supreme Court of the State of California from the judgment therein entered in said Superior Court on the 8th day of March, 1898, in favor of the defendant in said action and against said plaintiff and from the whole thereof.

S. W. & E. B. HOLLADAY, Attorneys for Plaintiff.

Dated June 6, 1898.

To the Clerk of said Court, and to defendant, Florence Hinckley, and to Wm. H. H. Hart, Esq., her attorney.

Service of a copy of the foregoing Notice of Appeal is admitted this 6th day of June, 1898.

WM. H. H. HART,
Attorney for Defendant, Florence Hinckley.

[Endorsed]: Filed 4:35 P. M. June 6, 1898. C. F. CURRY, Clerk. By Geo. W. Lee, Deputy Clerk.

[Title of Court and Cause.]

CERTIFICATE.

It is hereby certified that the foregoing transcript is correct; it contains true and correct copies of the complaint, the demurrer of defendant thereto, the judgment entered on said demurrer and plaintiff's notice of appeal from said judgment, as they are on file herein in the office

of the County Clerk of San Francisco; and that a sufficient undertaking on appeal in due form of law for costs, in the sum of $300, was properly filed in said cause.

WM. H. H. HART,
Attorney for Respondent.

AYLETT R. COTTON,
Of Counsel for Respondent.

S. W. & E. B. HOLLADAY,
Attorneys for Appellant.

Dated....., 1898.

OPINION (127 Cal. p. 434).

FILED JANUARY 4, 1900.

DEPARTMENT TWO.

HENSHAW, J. — The purpose of this action was to recover from defendant certain land in the City and County of San Francisco. Plaintiff claims as an heir at law of Thomas H. Blythe, deceased. Without setting forth in detail the matters charged it will be sufficient to say that the complaint pleads the proceedings and the judgments of the Superior and Supreme Courts of this State, under which it was decreed that Thomas H. Blythe had instituted Florence Blythe, now Florence Blythe Hinckley, as heir, and the subsequent decree of the Court distributing the property in question to her. The facts and the judgment to which reference has thus been made will be found at length in the action entitled *Blythe* v. *Ayres*, 96 Cal. 532. It is contended by this bill that the judgments of the Superior Court and of this Court so decreeing are absolutely void, and that plaintiff as one of the heirs at law of Thomas H. Blythe, deceased, should have judg-

ment to that effect. A general demurrer was sustained to this bill and plaintiff declining to amend and appeals from the judgment thereupon entered against him. In support of the complaint it is urged that Florence Blythe at the time of descent cast was an alien and British subject who had never been within the jurisdiction of the United States or of the State of California, and that the State of California had and has no power to extend to such non-resident aliens the right to inherit real estate within its territorial domain in the absence of a treaty provision to that effect between the United States and the country of such alien; that Sections 230 and 1387 of the Civil Code, as applied to the case of such a non-resident alien are without effect; that Section 671 of the Civil Code is in violation of Section 10 of Article I of the Constitution of the United States, which declares that, "No State shall enter into any treaty, alliance, or confederation," and is in violation of Section 17 of Article I of the Constitution of the State of California, which (it is argued) limits the right of succession to the classes designated in the following language: "Foreigners of the white race or African descent eligible to become citizens of the United States under the naturalization laws thereof, while *bona fide* residents of this State, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission and inheritance of property, as native-born citizens." It has been affirmed and reaffirmed in the decisions of the Supreme Court of the United States that the question of the possession, enjoyment and inheritance of property by resident or non-resident aliens is the proper subject-matter of treaty. Thus, to employ but one quotation, in *Geofroy* v. *Riggs*, 133 U. S. 258, it is said: "That the treaty power of the United States extends to all proper subjects of

negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another and the manner in which that property may be transferred, devised or inherited are fitting subjects for such negotiation, and of regulation by mutual stipulations between the two countries." This principle was early recognized in this State in the case of *People* v. *Gerke*, 5 Cal. 381.

It need scarcely be said that at common law an alien was not of inheritable blood, and that disability attaches in this State, unless it has been removed by express law. By Section 671 of our Civil Code it is declared that "Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State." Here is an express removal of the disability to which we have referred, and if it be a valid law, it is determinative of appellant's contention. It is conceded that the treaties between Great Britain and this country are silent upon the subject. We are not then confronted with the case of a State law in declared conflict with a provision of a treaty, in which instance it is, of course, uniformly held that the treaty is the paramount law. (*Opel* v. *Shoup*, 100 Iowa, 407; *Hauenstein* v. *Lynham*, 100 U. S. 483; *Geofroy* v. *Riggs*, *supra*; *Orr* v. *Hodgdon*, 4 Wheat. 453.) But by appellant it is insisted that the very silence of our treaties with Great Britain upon the question is the equivalent of an express denial to its subjects of the right to inherit within our Republic, and that therefore a conflict arises and Section 671 becomes void, as an illegal attempt to encroach upon the treaty-making power of the General Government. But this view, we think, finds little favor, either in principle or authority. A State has the undoubted right to regulate the tenure and dis-

position of the real property within its boundaries, and such regulations always have been and should be held valid, except where they conflict with the express provisions of a higher law. Thus in *United States* v. *Fox*, 94 U. S. 315, it is said: "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established rule of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." (See, also, *Hutchinson Investment Co.* v. *Caldwell*, 152 U. S. 65; *Mager* v. *Grima*, 8 How. 490; *Beard* v. *Rowan*, 9 Pet. 301.) And this right to regulate the tenure and the disposition of real property within its boundaries is not only in the State, but it is primarily in the State (*Hauenstein* v. *Lynham*, 100 U. S. 483), and is subject only to such control as may be exercised by the General Government within its treaty-making power. Therefore, it will be found that the Supreme Court of the United States nowhere declares State laws upon the subject to be void as an invasion of the treaty-making power, but uniformly upholds the laws when not in conflict with the express provisions of a treaty. Such was the case *Hanrick* v. *Patrick*, 119 U. S. 156, where the question was of the right of an alien subject of Great Britain to inherit, and the court held that the laws of Texas governing the rights of aliens to inherit property in that State were of controlling force. And even in those cases where there is a conflict between the provisions of the State law and those of the treaty, it is not held that the

State laws are void as an unwarranted interference with or encroachment upon the powers of the Federal Government. It is held merely that such laws, in so far as they conflict with the treaty provisions, are suspended or controlled during the life of the treaty. Thus in *Geofrey* v. *Riggs supra*, the question being as to the effect of the provisions of the treaty with France upon the laws of Maryland, which were in operation in the District of Columbia, it is said: "The treaty being part of the supreme law of the land, controls the statute and common law of Maryland whenever it differs from them. * * * The treaty expired by its own limitation in eight years pursuant to an Article inserted by the Senate. During its continuance citizens of France could take property in the District of Columbia by inheritance from citizens of the United States, but after its expiration that right was limited as provided by the statute and common law of Maryland." It is concluded, therefore, upon this proposition that the sections of our Civil Code which have been under consideration are not in conflict with the provisions of any treaty between the United States and Great Britain, and are not an invasion of the treaty-making powers of the United States Government. The argument that Section 671 is inoperative to cast descent upon defendant for the reason that the laws of the State can have no extraterritorial force, seems to be fully answered by the language of this Court in *State* v. *Smith*, 70 Cal. 153, where it is said, discussing this very section: "It is suggested that inasmuch as laws can have no extraterritorial operation, the Legislature has no power to provide for succession by foreigners who had never been residents, but the section of the Code provides a rule with respect to property within the State. It confers a right to be enjoyed within the jurisdiction." The further contention that Section 671 of the Civil Code is

void because in conflict with Section 17 of Article I of the Constitution of the State of California, rests for its support upon the argument that the language of the Constitution is a limitation upon the power of the Legislature. But to give it such an interpretation would be to do violence to fundamental rules of construction. By Section 17, foreigners of the indicated classes may not be deprived of the rights which the Constitution secures to them. But there is in this no withdrawal from the Legislature of its general powers, nor any limitation upon its right to extend similar privileges to other foreigners or aliens. (*State* v. *Rogers*, 13 Cal. 160.)

It follows from the foregoing that the order of Court sustaining defendant's demurrer was properly made, and the judgment appealed from is therefore affirmed.

TEMPLE, J., and MCFARLAND, J., concured.

[Title of Court and Cause.]

Assignment of Errors by Boswell M. Blythe, on his Petition for Writ of Error.

I.

The Court erred in deciding that Section 671 of the Civil Code of California, reading, "Any person, whether citizen or alien, may take, hold, and dispose of property, real and personal, within this State," is an express removal of the common law disability of an alien to inherit land in this State, and that said section is not, in that respect, repugnant to the provisions of Section 10 of Article One of the Constitution of the United States, reading:—

"No State shall enter into any treaty, alliance, or con-
" federation. . . . No State shall, without the
" consent of Congress, . . . enter into any agree-
" ment or compact with a foreign power."

II.

The Court erred in deciding that California had the power to enact said Section 671 in its application to defendant or to remove the common law disability of an alien as to the inheritance of land in California in the absence of a treaty or otherwise in the face of the inhibition contained in said section of the Constitution.

The Court erred in deciding that the State of California had any power or jurisdiction to qualify a non-resident alien to take by inheritance real estate in California.

III.

The Court erred deciding that said defendant Florence (who was, at the time of the death of Thomas H. Blythe and descent of his estate cast, a subject of Queen Victoria, and an illegitimate minor child residing and domiciled in England) did or could take the land in California, here involved, by succession under and by the force of said Section 671 of the Civil Code of California, in spite of said provisions of Section 10 of Article One of the Constitution of the United States.

IV.

Said Court erred in deciding that defendant did take by inheritance the land here in controversy in California solely under said Section 671 of the Civil Code of California, notwithstanding the Court's opinion that the regulation of the descent of real property to aliens was and is within the treaty-making power of the United States.

The Court erred in deciding that the very silence of the treaties existing between the United States and Great Britain upon the matter of giving to British subjects residing in England the right to inherit land in the

United States is not equivalent to an express denial to British subjects of the right to inherit land within the United States.

The Court erred in holding that defendant, a British subject, could take land by inheritance in California in the absence of a treaty between the United States and Great Britain enabling her so to do.

The Court erred in deciding that there is no conflict arising between the provision contained in Section 671 of the Civil Code, permitting defendant, an alien, to inherit land in California, and Section 10 of Article I of the Constitution of the United States; and that said Section 671, *quo ad* that matter, is not void as an illegal attempt to encroach upon the exclusive prerogative of the federal government to manage all its foreign relations.

The Court erred in deciding that said Section 671 of the Oivil Code so far as it regulates the descent of real property to aliens, does not encroach upon the treaty-making power of the United States.

The Court erred in deciding that said Section 671 of the Civil Code of California in so far as it provides for the descent of real property to aliens, is not repugnant to that provision of Section 10 Article One of the Constitution of the United States which forbids the States to enter into any agreement or compact with a foreign power without the consent of Congress.

V.

The Court erred in deciding that said Section 671 of the Civil Code of California is not repugnant to all of the existing treaties concluded between the United States and Great Britain; because in them the United States did not extend to British subjects (but refrained from extending to them) the privilege of inheriting land within the United States.

Said Court erred in deciding that said Section 671 of the Civil Code of California is not repugnant to Section 1978 of the Revised Statutes of the United States; for while said section of the laws of the United States insures to all citizens of the United States the same right in every State and territory as is enjoyed by the white citizens thereof to inherit real property.

Yet said Section 671 of the Civil Code of California as construed by the Court neutralizes said Section 1978 of the United States Revised Statutes, in California, by giving that same right to inherit land not only to all citizens of the United States, but to all aliens, the world over; and as applied in this case, said section of the California Code extended that right of inheritance to an alien British subject, residing in England, who was also an illegitimate child, to whom even English laws did not extend the right of inheritance.

The Court erred in deciding that Section 230 of the Civil Code of California reading:

"The father of an illegitimate child, by publicly "acknowledging it as his own, receiving it as such, with "the consent of his wife, if he is married, into his family, "and otherwise treating it as if it were a legitimate "child, thereby adopts it as such, and such child is "thereupon deemed for all purposes legitimate from "the time of its birth," — in its application to defendant, Florence (an English subject and an illegitimate minor child residing in England until after the time of descent cast), and with respect to her claim to have been adopted under it, and therefore to have inherited and taken by succession under said section, the land here involved, is not in conflict with the provisions of any treaty then existing between the United States and Great Britain, and is not an invasion of the treaty-making powers of the United States Government, and is not repugnant

to Section 10 of Article I of the Constitution of the United States.

The Court erred in deciding that Section 1387 of the Civil Code of California, reading:

"Every illegitimate child is an heir of the person who, "in writing, signed in the presence of a competent wit- "ness, acknowledges himself to be the father of such "child, and in all cases of his mother, and inherits his "or her estate, in whole or in part, as the case may be, "in the same manner as if he were born in lawful wed- "lock,"—or any act of Thomas H. Blythe under it relating to her, operated upon defendant, Florence (an English subject, and an illegitimate minor child residing in England until after the time of descent cast), and is not repugnant to Section 10 of Article I of the Constitution of the United States.

And that, as applied to defendant by the Court, said section was not an encroachment upon the diplomatic jurisdiction of the Federal Government, and is not in conflict with the provisions of any treaty then existing between the United States and Great Britain, and is not an invasion of the treaty-making power of the United States Government.

The Court erred in deciding that Sections 230 and 1387 of the Civil Code of California, above set forth, operated to clothe defendant with capacity to take the land here in controversy by inheritance.

The Court erred in deciding that the adoption of defendant by Thomas H. Blythe under Section 230 of the Civil Code, or the institution of defendant as an heir by Thomas H. Blythe under Section 1387 of the Civil Code of California, was the legal equivalent of a treaty enabling her to take said land by inheritance.

The Court erred in deciding that Sections 230 and 1387 of the Civil Code of California operated within the

field of foreign relations of the United States Government and outside of the geographical boundaries of the State of California, and as so operating were not repugnant to the Constitution of the United States.

The Court erred in deciding that said Sections 230 and 1387 of the Civil Code of California were not limited in their terms and their constitutional operation to the geographical limits and to the citizens of California.

The Court erred in deciding that Section 1664 of the Code of Civil Procedure of California enabled defendant, in lieu of a treaty, to institute a suit in any court of California to recover land under claim of succession thereto; and that said section, as construed by the Supreme Court and with regard to defendant's claim made thereunder, is not repugnant to said provisions of Section 10 of Article I of the Constitution of the United States, and is not repugnant to all the existing treaties of the United States and Great Britain, and is not repugnant to Section 1789 of the Revised Statutes of the United States.

The Court erred in deciding that the Superior Court of California, sitting in probate or otherwise, had any jurisdiction to entertain the claim of said defendant to the real property involved.

The Court erred in holding that any law of California clothed defendant with any right to inherit land in California or to sue to recover land under a claim thereto by inheritance.

The Court erred in deciding that all the alleged adjudications in favor of defendant by the courts of California were not void for want of jurisdiction in the State of California to bestow upon her any right to the land.

The Court erred in deciding that the State of California could and did clothe defendant, a non-resident alien, with the fee simple title to land by succession (thereby giving to her the right to live thereon forever) in the

face of the conceded power of the United States to remove and exclude defendant from the United States without assigning any reason therefor.

Said Court erred in giving judgment herein against this plaintiff and in favor of defendant.

Said Court erred in not giving judgment in favor of this plaintiff and against defendant.

Wherefor plaintiff, this petitioner, prays the judgment of the honorable Supreme Court of the United States reversing the judgment herein and for costs.

And since the infirmity of alienage existing in defendant's case is a matter which cannot be denied or avoided by her, but must be fatal to her claims, if plaintiff's constitutional objection is well taken, plaintiff asks that with a reversal of the judgment this Court make an order directing the court below to enter a final judgment for the plaintiff.

S. W. HOLLADAY,
E. BURKE HOLLADAY,
Attorneys for Plaintiff in Error.

Filed in the Supreme Court of California, July 6, 1900.